JAN 17 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 731

WAGS TRANSPORTATION SYSTEM, INC., a corporation; MORRIS LANSBURGH, and THERESA SCHAUER,

Petitioners,

v.

PRESTON G. PREVATT, as Ancillary administrator of the Estate of EDITH L. TREES, Deceased; GILDA DAHLBERG, a widow; POLLY LUX, a freedealer; TEDLAND REALTY CORPORATION, a Florida corporation,

Respondents.

Petition For A Writ of Certiorari To The Supreme Court Of Florida

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered on July 24, 1957 in the following consolidated cases: City of Miami Beach v. Dahlberg; City of Miami Beach v. Prevatt, and City of Miami Beach v. Tedland Realty Corp.

OPINIONS BELOW

No opinion was rendered by the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The opinion of the Supreme Court of Florida, rendered July 24, 1957 and amended on September 18, 1957, is reported in 97 So. 2d 473.

JURISDICTION

The judgment of the Florida Supreme Court in its original form was entered on July 24, 1957 (R.-422) (App C). A timely petition for rehearing was filed on August 21, 1957 (R.-436) (App D).

That court on September 18, 1957 entered an order denying the petition for rehearing and amended its opinion of July 24, 1957 (R. 444) (App E), adopting a new basis therefor.

A petition to recall the mandate was filed by the petitioners before The Florida Supreme Court on October 3, 1957 (App F). Upon examination by that court, the petition was ordered removed from the record and returned to the petitioners.

An order extending time within which to petition for a writ of certiorari up to and including Jan. 20, 1958 was entered by Justice Hugo L. Black on Dec. 5, 1957.

The decision on which review is sought was rendered by the highest court of the state. All appellate remedies of the state court have been exhausted by the petitioners.

The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1257 (3) because the petitioners have been deprived of due process of law and denied the equal protection of the law under the Fourteenth Amendment of the United States Constitution by state action through the decision and judgment of The Supreme Court of Florida, an agency of the State of Florida.

QUESTION PRESENTED

Did the Supreme Court of Florida deprive the petitioners and the citizens of Miami Beach of their "Day in Court" in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;

1) When the highest Appellate Court entered an opinion in a zoning case based upon an ordinance "foreign" to the record in the proceedings before it.

2) When following the filing of a petition for rehearing disclosing that the ordinance upon which the opinion was based had been repealed by an initiative referendum of the electorate, the court amended its opinion and ascribed an entirely new foundation therefor, and visited, without consent of petitioners, their petition for rehearing to the amended opinion, to which it was wholly inapplicable, and thereupon denied same.

3) When the court refused to permit any petition for rehearing or other pleading of the petitioners seeking review of the amended opinion although the applicable court rules permit, as a matter of right, such review.

4) When implicit in the action of the court is the imposition of added tax burdens on the citizens of Miami Beach, notwithstanding the people voted in the referendum election against the unfair expense.

5) When the Supreme Court of Florida in an identical companion case (with which the cases at bar were consolidated by the trial court) on interlocutory appeal entered final judgment denying relief, thus estopping by judgment the same relief which it granted in the cases at bar.

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The Due Process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Zoning Ordinance of Miami Beach, Florida, No. 289.

STATEMENT OF THE CASE

Procedural History of the Case:

The Petition for Writ of Certiorari combines three separate suits against the City of Miami Beach, Florida, brought in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. They were: Edith L. Trees vs. City of Miami Beach, Gilda Dahlberg vs. City of Miami Beach, and Tedland Realty Corporation vs. City of Miami Beach. These zoning cases were consolidated for trial and a decree was entered, favorable

to the contentions of the respondents that Zoning Ordinance No. 289 (App-A) of the City of Miami Beach, classifying the parcels of land owned by the respondents as single-family estates, was unconstitutional and void insofar as it applied to their lands.

The parcels of land involved in this litigation are a part of a strip of land, located near the center of the island which composes the City of Miami Beach. It is approximately 1½ miles in length from north to south and approximately 700 feet in width, bounded on the east by the Atlantic Ocean and on the west by a waterway known as Indian Creek, which is approximately 350 feet in width.

The trial court decreed that the respondents were entitled to use their lands in such a manner as would permit the construction of apartments or hotels and enjoined the City from enforcing the Zoning Ordinance insofar as it limited the use of the several properties for single-family estates. (R-301) (App B).

Following the entry of the decree by the trial court in these cases in which the respondents were plaintiffs and the City of Miami Beach, solely, was the defendant, the petitioners (owners of property in the affected area) applied to the trial court for permission to intervene (R-69) for the purposes of perfecting an appeal of that decree. The intervention was grounded upon the fact that the Council of the City of Miami Beach did not intend to appeal the decree because it was tainted with a self-interest in the rezoned property adverse to the interests of the citizens of the City, in that one of the Councilmen stood to gain six hundred thousand dollars profit

in the rezoning of this strip by reason of his ownership of a substantial portion of the land involved.

Intervention was denied by the trial court (R-77) and even though an appeal of the main cases had been taken by the City, an appeal by certiorari from the order denying intervention was prosecuted by the petitioners to the Supreme Court of Florida on the ground that the City would not in good faith prosecute the appeal.

The order denying the right of the petitioners to intervene was quashed and the intervention was allowed. (R-78) **Wags Transportation System, Inc. vs. City of Miami Beach, 88 So. 2d 751 (Fla., 1956)**

Justice Terrell, in delivering the per curiam opinion of the Supreme Court, stated:

> "We think the petition to intervene showed such an interest in the res that the ends of justice require that it be granted. It was clearly within the exception to the general rule. Nothing is more sacred to one than his home and the petitioners should have been permitted to come in and bring their rights in this to the attention of the court. We do not overlook the fact that intervention is in subordination to and in recognition of the main proceeding. No new issues can be injected but none were attempted in this case. The home often has intrinsic and other values that no one knows of but the owner. In a case where it is sought to turn these values into other channels, it would be contrary to every

element of due process to hold that the owner should not be permitted to intervene and bring or help bring these factors to the attention of the court."

The exposé occasioned by the facts alleged in the petition for intervention caused the council to take an appeal. The petitioners took no part in making the record in the lower court. The respondents and the City of Miami Beach are responsible therefor.

On April 22, 1957 at the commencement of oral argument on appeal, the City Attorney withdrew and declined to argue the case upon the ground that the City Council on April 17, 1957, had amended the zoning ordinance in question by re-zoning the strip of land involved which included respondents' property, in line with the lower court's decree so as to allow the construction of hotels and apartments on the entire strip. (R-428)

Thereupon, the petitioners' attorney was called upon to face and argue the question of whether or not the problem involved upon appeal had become moot.

This was a matter which was not before the trial court and completely foreign to the record on appeal. However, on the basis of this action by the City Council, the Supreme Court of Florida on July 24, 1957, affirmed the judgment of the trial court, stating in its opinion:

"The principal point raised on the appeal and argued by appellant intervenors is completely undermined by the enactment of the amendatory

ordinance. The basic contention of appellants in this appeal is that the reasonableness of the ordinance of the City of Miami Beach (original ordinance #289 of 1939) which was declared void and unenforceable by the trial court, being "fairly debatable", the decree of the trial court holding that the ordinance was unconstitutional must be reversed in accordance with the previous holdings of this Court in the numerous cases which we have cited and discussed. Now that the ordinance of the City of Miami Beach classifies this property for use as hotel and apartments, the very argument made by the appellant necessarily leads to an affirmance of the decree of the trial court. Cf. Gadsden County v. Kerce, 141 Fla. 596, 193 So. 772 (1940); Moody v. Volusia County, 93 Fla. 1115, 113 So. 563 (1927). Also see I Florida Law and Practice - Appeals Sections 181, 182. The city fathers have determined, as they were directed to do in the decree here under review, that the ordinance which restricted this property to residential use is not warranted and have provided other uses therefor. The record reveals no basis on which we would be authorized to upset the decree nor anything that would be accomplished by doing so." (R-428) (App C).

On August 6, 1957, the qualified electors of Miami Beach, Florida, in a special referendum election voted to repeal the amendatory ordinance of April 17, 1957 rezoning the property.

It was urged in the petition for rehearing filed Au-

gust 21, 1957 (R-436) (App-D) by the intervenor-appellants that in view of the fact that the basis for the decision of July 24, 1957 no longer existed the Court should rehear the case and render its decision on the questions raised by the briefs and in accordance with the facts presented in the record. Approximately one month later, on September 18, 1957, the Supreme Court entered an order amending its decision of July 24, 1957, (R-444) (App E) and presented an entirely new and different basis for its prior judgment. This order also included a denial of the Petition for Rehearing. Not only was rehearing denied with regard to the opinion of July 24, 1957, but the Court, by "visiting" the petition to the amended opinion, cut off any rights of the petitioners to question the opinion as amended.

How Federal Question Was Presented:

The federal question was raised in these proceedings by Petition to Recall Mandate filed in the Supreme Court of Florida on October 3, 1957, (App. F) in which it was stated:

> "Upon the '**amended**' opinion, judgment of affirmance was pronounced by the Supreme Court of Florida and its Mandate was issued to the lower court. Thus, these appellants were deprived of the right to question by further petition for rehearing the obvious fault of the amended opinion. This right denied is not a mere concession to technicality in view of the estoppel by judgment which arises by virtue of the judgment of this Court in the case of **The City of**

Miami Beach v. Ralph Lachman and Jean Lachman, 85 So. 2d. 226, to which the above-entitled causes were bound by an order of consolidation in the lower court. Thus, these acts of the Supreme Court of Florida, done unexpectedly at the end of the proceedings, and which could not be contemplated by these appellants, deprived these appellants of due process of law and the equal protection of the law guaranteed to them by the Fourteenth Amendment of the Constitution of the United States."

Although this petition set forth all necessary requisites under Florida law (**Chapman v. St. Stephens Protestant Episcopal Church, Inc., et al., 105 Fla. 683, 138 So. 630**), it was construed by the Supreme Court of Florida as a second Petition for Rehearing and upon instruction from the Court, it was removed from the records of these cases and returned to the petitioners with the clerk's filing stamp thereon voided. In that the federal question did not arise until the petitioners were denied their constitutional rights by the Florida Supreme Court's denial of the Petition for Rehearing, it is respectfully urged that the raising of the federal question by the Petition to Recall Mandate was both proper and timely to give the United States Supreme Court jurisdiction of this matter on Writ of Certiorari. **Saunders v. Shaw, 244 U. S. 317, 37 Sup. Ct. Rep. 638.**

REASONS FOR GRANTING WRIT OF CERTIORARI

The importance of the subject matter of the cases in which review on writ of certiorari is sought, to the

entire citizenry of Miami Beach as well as to the petitioners, cannot be minimized.

The land formerly protected by the zoning ordinance which has been unconstitutionally emasculated in these proceedings is the only remaining oceanfront property in the entire City of Miami Beach that has been preserved for residential purposes.

The record disclosed that the rezoning of the subject property to allow the construction of apartments and hotels thereon would lead to tremendous increase in traffic in this and adjacent residential areas (R 231, 232). This increase in traffic would necessitate the building of new bridges (R 248, 249) and the widening of Collins Avenue (R 255). The sewer and water systems now serving this area would also be inadequate to meet the needs of the additional number of people which would be housed in this area (R 248). All of these additions to the present facilities in the subject area can only be accomplished at tremendous expense to the citizens and taxpayers of Miami Beach in the amount of Three Million Four Hundred Thousand ($3,400,000.00) Dollars. (R 256,257) The vote of the people against the rezoning and against the additional tax burden was implicit in the repeal of the amendatory ordinance.

The Supreme Court of Florida, in its opinion of July 24, 1957, deals at length with the Florida law on zoning cases but further states, unequivocally, that inasmuch as the City Council itself had repealed the sections of the zoning ordinance that the trial court had struck down, a reversal of the trial court's judgment, however meri-

torious, would be of no consequence. This is the sole reason that the Court ascribed for its departure from the long line of cases in which it has repeatedly upheld this very same ordinance, as applied to identical property, under the "fairly debatable" doctrine which controls zoning issues in this State. **City of Miami Beach** v. **Lachman,** 71 So. 2d 148.

Assuming that the court could consider and base its decision in this appeal on a matter outside of the record, it follows that in the event this matter so considered is substantially undermined, or, as in this case, completely destroyed, the constitutional guarantees of the Fourteenth Amendment to the United States Constitution compel the Court to permit petitioners the substantial right to petition for rehearing, thus compelling the Court to re-examine its judgment.

The matter outside the record on which the Court based its opinion was the repeal of the sections of Miami Beach Ordinance No. 289, amended as of August 8, 1953 (App.-A), which the trial court had invalidated by injunction. Not only was it improper and unfair for the court to consider the repeal of these sections, but the action of the City Council in so repealing these sections of the ordinance was, in fact, violative of the City Charter and was later struck down by the Florida Circuit Court in the case of **Lansburgh v. City of Miami Beach (unreported).** In that case the court held that the vote of the council taken for repeal of the ordinance was fraudulent in that a member of the City Council whose vote was necessary to pass the amendatory ordinance stood to gain close to six hundred thousand ($600,000.00) dollars profit on

speculation in the lands rezoned by this ordinance. Unfortunately, this case was decided after the petitioners were compelled by the law to file their petition for rehearing. Amendments to the petition for rehearing to include the results of the above case were not allowed.

Of greater importance, however, is that the Florida Supreme Court had before it, for its consideration on the petition for rehearing (R 436) (App-D) filed August 21, 1957, the results of a special initiative referendum election of August 6, 1957, by which the people of Miami Beach voted to repeal the amendatory ordinance which was the basis of the court's decision of July 24, 1957.

The decision of the Supreme Court of Florida contrary to the wishes of the people of Miami Beach imposes a tax burden upon them of approximately $3,400,000 in improvements that these taxpayers must pay for through added tax assessments in order to provide facilities to serve the rezoned property. Thus, money will be taken without due process from the pockets of the landowners of Miami Beach to equip private property for a new private use.

The cases at bar were consolidated with the case of Ralph and Jean Lachman, plaintiffs v. City of Miami Beach, defendant, because the properties of the several plaintiffs "in each of the causes are similarly situated and that the issues in the several causes are and will be the same." (R 12) In fact, the land involved in the Lachman case lies along side of the land of one of the respondents in the case at bar. By interlocutory appeal the motion to dismiss the Lachman case was brought to

the Supreme Court of Florida. See, **City of Miami Beach v. Lachman, 85 So. 2d, 226.** (App-G)

The Court held that it was thoroughly familiar with the history of the property involved and directed the lower court to enter final order dismissing the complaint, and thus bound itself to an adjudication in the cases at bar contrary to its opinion and decision of July 24, 1957, as amended.

By virtue thereof, petitioners have been denied the due process of law and the equal protection of the law as it has been and will continue to be administered in Florida. There is no rational or ascertainable standard by which an exception may be justified in the cases at bar.

The Supreme Court of Florida entered the Lachman mandate on February 8, 1956 and the final decree of the trial court in the remaining three cases here involved was rendered on the 8th day of May, 1956. (R-304) (App-B)

In spite of the overwhelming logical implications to be drawn from these factors, the court denied rehearing. To accomplish this, it amended its opinion 30 days after the petition for rehearing had been filed, by adding these words thereto:

> "'Moreover, the evidence in this record has been carefully examined by us and we think the conclusion is inescapable that, under the conditions existing as to the lands involved in this litigation at the time the chancellor entered his decree, the conclusion he reached is without error and should be affirmed, regardless of the

subsequent enactment of the ordinance after the date of the final decree.'"

Thus the Supreme Court of Florida "visited" the petition for rehearing to the amended opinion and denied it. (R 445) (App-E) In so doing, the petitioners were denied not only the right to be heard in opposition to the surprise issue improperly entertained during the oral argument, but the court, in an ex post facto assertion of its powers, deprived the petitioners of the recognized process universally available to question such actions. It is apparent from these facts that the petitioners have been denied due process of law and equal protection of the law under the Fourteenth Amendment to the United States Constitution.

The property rights of which the petitioners and the people of Miami Beach have been deprived are indeed substantial ones. The sole remaining hope for preserving these rights rests with the Supreme Court of the United States.

CONCLUSION

Therefore, petitioners respectfully request that a writ of certiorari issue to the Supreme Court of Florida.

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(APPENDIX "A")

Herein are set forth those sections of Miami Beach City Ordinance No. 289 applicable to the subject property designated as District 51 by this ordinance:

ORDINANCE NO. 289

Zoning Ordinance of Miami Beach, Florida
Amended as of April 8, 1953

AN ORDINANCE TO REGULATE AND RESTRICT THE ERECTION, RECONSTRUCTION, ALTERATION, LOCATION AND USE OF BUILDINGS, STRUCTURES, LAND AND WATER, FOR TRADE, INDUSTRY, RESIDENCE, OR OTHER PURPOSES; TO REGULATE AND RESTRICT THE SIZE OF BUILDINGS AND OTHER STRUCTURES HEREAFTER ERECTED OR ALTERED, THE SIZE AND DIMENSIONS OF YARDS, COURTS AND OTHER OPEN SPACES SURROUNDING BUILDINGS; TO REGULATE AND RESTRICT BUILDING LINES AND THE PERCENTAGE OF LOT THAT MAY BE OCCUPIED, AND THE DENSITY OF POPULATION, AND FOR SAID PURPOSES TO DIVIDE THE CITY OF MIAMI BEACH INTO DISTRICTS OF SUCH NUMBER, SHAPE AND AREA AS MAY BE DEEMED BEST SUITED TO CARRY OUT THESE REGULATIONS, AND FOR EACH SUCH DISTRICT TO IMPOSE REGULATIONS AND RESTRICTIONS DESIGNATING THE KINDS OR CLASSES OF TRADES, INDUSTRIES, RESIDENCES OR OTHER PURPOSES FOR WHICH BUILDINGS OR OTHER STRUCTURES OR PREMISES MAY BE PERMITTED TO BE ERECTED, ALTERED OR USED; TO PROVIDE

A METHOD FOR AMENDMENT, SUPPLEMENT, CHANGE, MODIFICATION AND REPEAL OF REGULATIONS, RESTRICTIONS AND BOUNDARIES; TO PROVIDE A METHOD OF ADMINISTRATION; TO PROVIDE A BOARD OF ADJUSTMENT AND PRESCRIBE ITS POWERS AND DUTIES AND TO PRESCRIBE PENALTIES FOR THE VIOLATION OF THE PROVISIONS OF THIS ORDINANCE AND ALSO PROVIDE FOR ITS ENFORCEMENT.

WHEREAS, by the provisions of Chapter 9837, No. 719 Special Laws of Florida, 1923, authority is conferred upon the City of Miami Beach to establish districts or zones within its corporate limits for the purpose of regulating the use of land and buildings, the height of buildings, the size of open spaces surrounding buildings and density of population, and

WHEREAS, the City Council of the City of Miami Beach deems it necessary in order to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements, to make and promulgate such regulations with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout said City in accordance with a comprehensive plan:

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Miami Beach, Florida:

SECTION 1.

DEFINITIONS: For the purpose of this Ordinance, certain terms and words are herein defined. Words used in the present tense include the future; the singular number includes the plural, and the plural the singular; the words "used for" include the meaning "designed for"; the word "structure" includes the world "building"; the word "shall" is mandatory and not directory; the word "lot" includes words "plot" and "tract".

* * * *

APARTMENT: A dwelling designed for occupancy otherwise than as a one-family dwelling, or a two-family dwelling. The term "Multiple Dwelling" shall be understood to include apartment houses, bungalow courts, and all other family dwellings of similar character, but not to include hotels or apartment hotels.

APARTMENT HOTEL: An apartment building, under resident supervision, which maintains an inner lobby through which all tenants must pass to gain access to the apartments and which may furnish dining room service for tenants only (427)

* * * *

DWELLING, ONE-FAMILY: A detached building designed for or occupied exclusively by one family.

FAMILY: One or more persons occupying premises and living as a single housekeeping unit, as distinguished from a group occupying a boarding house, a lodging house or hotel, as herein defined.

• • • •

HOTEL: A building or premises where lodging accommodations of more than five (5) rooms are provided. (340)

LOT: A parcel of land fronting on a street, place, way or waterway, which is or may be occupied by a building and its accessory buildings, including the open spaces required under this ordinance, and which percel of land is a matter of record in Dade County, Florida.

• • • •

SECTION 2.

DISTRICTS

In order to regulate and restrict the erection, reconstruction, alteration, location and use of buildings, structures, land and water, for trade, industry, residence, or other purposes, and the location thereof, and to regulate the size of buildings and other structures hereafter erected or altered, to regulate and determine the size and dimensions of yards, courts and other open spaces and to regulate and limit the percentage of lot that may be occupied and the density of population, the City of Miami Beach, Florida, is hereby divided into use, area and parking districts as follows: (572) (1036)

Use Districts

(518)

1. RAA, RA, RB and RC Estate Districts.

2. RD Single-Family District.

3. RDD Modified Single-Family District.

4. RDE Restricted Multiple-Family District.

5. RE Multiple-Family District.

5½. REE Multiple Family District. (1036)

5a. BAAA, Modified Business District. (1036)

6. BAA, BA, BB, BC, BD, BE, BF, and BG Business Districts.

7. Cabana and Swimming-Pool District. (841)

8. Two-Story Cabana District. (855)

Area Districts

Area Districts as hereinafter set forth. (518)

Parking Districts

Parking Districts as hereinafter set forth. (1036)

The City of Miami Beach, Florida, is hereby divided into use, area and parking districts aforesaid, and the boundaries of such districts are shown on the use, area and parking maps attached hereto, which together with the legends, words, figures, letters, symbols and other explanatory matter thereon, shall be made parts of this ordinance as if the matters and information set forth thereon were all fully described herein.

This ordinance shall be known as the "Zoning Ordinance of Miami Beach, Florida," and the maps hereto attached designated as the "District Maps."

No building shall be erected, constructed, reconstructed or structurally altered, nor shall any building or land be used for any purpose other than the use permitted in the Use District in which such building or land is located.

No lot area shall be so reduced or diminished that the yards or other spaces shall be smaller than prescribed by this ordinance, nor shall the density of population be increased in any manner except in conformity with the area regulations herein established, and shown on the Area Map.

Every building hereafter erected, constructed, reconstructed or structurally altered shall be located on a lot as herein defined, and in no case shall there be more than one building on one lot except as hereinafter provided for.

In connection with every building hereafter erected, construction, reconstructed or structurally altered, park-

ing spaces shall be provided as hereinafter provided. (1036)

SECTION 3.

USE REGULATIONS

Estate Districts

In the "RAA", "RA", "RB" and "RC" Estate Districts no building or land shall be used and no building shall hereafter be erected, constructed, reconstructed or structurally altered which is designed, arranged or intended to be occupied or used for any purpose other than a single-family residence, together with its accessory buildings, and in accord with the area provisions as hereinafter defined, excepting for one or more of the following uses:

1. Parks, playgrounds, automobile parking areas, or municipal buildings, owned and operated by the City of Miami Beach, provided that no automobile parking area so owned and operated by said City shall be located at a distance greater than 350 feet from a Business District. (829)

* * * *

SECTION 15

(447) (518)

In all Use Districts, hereinafter designated, every

building hereafter erected, constructed, reconstructed or structurally altered shall provide a lot area and/or a floor area per family of not less than the following:

1. "RAA" Estate District, 40,000 sq. ft. lot area per family.

2. "RA" Estate District, 30,000 sq. ft. lot area per family.

3. "RB" Estate District, 18,000 sq. ft. lot area per family.

4. "RC" Estate District, 10,000 sq. ft. lot area per family.

5. "RD" Single-Family District, 6,000 sq. ft. lot area per family.

* * * *

DISTRICT NO. 51. There shall be a front yard having a depth of not less than 65 feet, measured from the ocean, and a rear yard having a depth of not less than 50 feet, measured from Collins Avenue, and a side yard having a width of not less than 10 feet on either (each) side of a building. (1032)

* * * *

SECTION 17.

GENERAL PROVISIONS

1. AREA RESTRICTIONS:

a. In the "RAA," "RA," "RB," "RC" and "RD" Single Family Districts and the "RDD" Modified Single-Family District, accessory buildings shall not occupy in the aggregate more than thirty (30) percent of the maximum yard area.

b. Lot areas or dimensions shall not be so reduced or diminished that the yards or open spaces shall be smaller than those provided by this ordinance, nor shall the lot area per family be reduced in any manner except in conformity with the area regulations hereby established for the District in which the building is located.

c. No dock, wharf, dolphin or structure of any kind shall be erected, constructed or reconstructed, so as to extend into Biscayne Bay, a distance greater than twenty-five (25) feet, or so as to extend into Indian Creek, a distance greater than fifteen (15) feet or so as to extend into Collins Canal a distance greater than three (3) feet or so as to extend into any other waterway in the City of Miami Beach a distance greater than five (5) feet, except that with special permission of the City Council, docks, wharves, dolphins or similar structures may extend from a business or multiple-family lot into Biscayne Bay, a distance not greater than one hundred twenty-five (125) feet. No part of any such dock, wharf, dolphin or structure shall be higher than two (2) feet above the top of the

adjoining seawall or the established grade for the sea wall if not exists. (584)

d. This ordinance shall not be construed to prevent the construction of a building on any lot of record at the time of passage of this ordinance, notwithstanding that such lot may have a lesser area than is required in the particular area district in which it is situated.

e. In the "RAA," "RA," "RB," "RC," "RD" Single Family Districts. "RDD" Modified Single-Family District "RDE" Restricted Multiple-Family District, "REE" Multiple-level Automobile Parking Garages, and in the "RE" Multiple-Family District, no accessory building shall be constructed except concurrently with or subsequent to the construction of the main building. (518)

2. WALLS AND FENCES:

a. In the "RAA" and "RA" Estate Districts, walls may be erected, constructed, reconstructed or structurally altered, provided, however, that such wall or walls shall not exceed ten (10) feeet in height above grade.

b. In the "RB" and "RC" Estate Districts, walls may be erected, constructed, reconstructed or structurally altered, providing, however, that such wall or walls shall not exceed six (6) feet in height above grade.

c. In the "RD" Single-Family District and the "RDD" Modified Single-Family District walls may be erected, constructed, reconstructed or structurally altered, provided, however, that such walls shall not exceed five (5) feet in height above grade.

d. In the area bounded on the North by the South line of Lot "A" INDIAN BEACH CORPORATION SUBDIVISION as recorded in Plat Book 8 on Page 61 of the Public Records of Dade County, Florida, on the South by the South line of FISHER'S FIRST SUBDIVISION OF ALTON BEACH as recorded in Plat Book 2 on Page 77 of the Public Records of Dade County, Florida, on the West by Collins Avenue and on the East by the Atlantic Ocean, walls may be erected, constructed, reconstructed or structurally altered, provided, however, that such walls shall not exceed seven (7) feet in height above grade.

* * * *

3. PROJECTIONS INTO YARD AREAS:

* * * *

h. That in multiple family and business districts on lots which abut on the ocean, accessory buildings such as cabanas, swimming pools and appurtenances, dining terraces, etc., may be constructed in the yard which abuts the ocean; provided that no such building shall encroach on the side yard areas; and provided further that such buildings shall not exceed one (1) story, nor in any event shall the height of such building be in excess of eighteen (18) feet above mean low water. No canvas or other temporary construction shall be permitted on the roofs of buildings erected in a yard area under these provisions. (792)

* * * *

SECTION 20.

INTERPRETATION, PURPOSE AND CONFLICT

In interpreting and applying the provisions of this ordinance they shall be held to be the minimum requirements for the promotion of the health, safety, morals or general welfare of the community. It is not intended by this ordinance to interfere with, abrogate or annul any easements, covenants or other agreements between parties, provided, however, that where this ordinance imposes a higher standard upon the use of buildings or premises, or requires larger open spaces than are imposed or required by other ordinances, rules, regulations or by easements, covenants or agreements, the provisions of this ordinance shall control.

SECTION 21.

CHANGES AND AMENDMENTS

Upon its own initiative, or upon the petition of the owners of a majority of frontage in any area, the City Council may, after having held a public hearing following at least fifteen (15) days notice of a time, place and object of such hearing published in an official paper, or a paper of general circulation in said City of Miami Beach, amend, supplement, change, modify or repeal the regulations and boundaries herein established, provided, however, that no amendment shall become effective except by the favorable vote of five-sevenths (5/7) of all the members of the City Council.

The provisions relative to public hearings and official notices shall apply equally to all changes or amendments. (742)

* * * *

SECTION 23.

VALIDITY AND PENALTY

Should any section, clause or provision of this ordinance be declared by the Court to be invalid, the same shall not affect the validity of the ordinance as a whole or any part thereof, other than the part so declared to be invalid.

Any person, firm or corporation who shall violate or fail to comply with any of the provisions of this ordinance shall be punished by a fine of not less than Five Dollars ($5.00), nor more than Fifty Dollars ($50.00), or be imprisoned in the City Jail for not more than Thirty (30) Days, or both, in the discretion of the Court. Each day that a violation is permitted to exist shall constitute a separate offense.

All ordinances or parts of ordinances in conflict herewith or inconsistent with the provisions of this ordinance are hereby repealed.

BE IT FURTHER ORDAINED that this ordinance shall take effect immediately after its passage, approval and posting, as provided by law.

PASSED AND ADOPTED this 3rd day of December, A. D. 1930.

* * * *

(APPENDIX "B")

IN THE
CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA.
IN CHANCERY

No. 185497

PRESTON G. PREVATT, as Ancillary Administrator Cum Testamento Annexo of the Estate of Edith I. Trees, deceased,

Plaintiff,

vs.

CITY OF MIAMI BEACH, a Municipal corporation organized and existing under the Laws of the State of Florida,

Defendant.

No. 185498

TEDLAND REALTY CORPORATION, a Florida corporation,

Plaintiff,

vs.

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the Laws of the State of Florida,

Defendant.

No. 185499

GILDA DAHLBERG, a widow, and POLLY LUX, a free dealer,

Plaintiff,

vs.

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the Laws of the State of Florida,

Defendant.

FINAL DECREE

These cases, consolidated for trial, coming on to be heard this day by the Court, and the Court having heard the testimony of the witnesses, considered the documentary evidence and heard the argument of counsel, FINDS:

That the three cases considered here are the latest in a long series of cases concerning the rezoning of certain ocean front property lying East of Collins Avenue and North of 44th Street in Miami Beach, Florida. The instant cases were consolidated by order of Court with a similar suit bearing Chancery No. 169612, styled Ralph Lachman and Jean Lachman vs. The City of Miami Beach. In this case a Motion to Dismiss attacking the sufficiency of the Complaint was denied by the Circuit Court. On review by certiorari in the Florida Supreme Court, the

petition was first denied and then on rehearing granted with directions to the Circuit Court to dismiss the amended complaint. An order dismissing the complaint was thereupon entered. A further amended complaint in the form of a new proceeding was filed in another division of the Court and is now pending on several motions to dismiss. After the ruling of the Supreme Court in case No. 169612, amendments to the complaints were filed in the three cases here under consideration.

Thereupon the Defendant moved for Summary Judgment on the ground that the matters involved in these suits had been previously decided by the Supreme Court of Florida in prior cases and the Mandate dismissing the complaint in the Lachman case (No. 169612) controlled the disposition of these consolidated cases. Upon consideration of the motion no order was entered, but the cases were brought on for trial, the testimony was taken and record made.

The Court is of the opinion that the disposition of prior cases involving the property in question here and lands similarly situated does not preclude these new suits being filed under change of circumstances or time in new attempts to secure zoning change.

The Court finds that the property involved in these cases was zoned RAA Estate District and restricted to use for single family estate purposes by Ordinance No. 289 of the City of Miami Beach, adopted on December 3, 1930. That there has been such a change in the neighborhood and area where this property is located, and in the entire City of Miami Beach, that it has become wholly

impracticable to maintain such zoning. That the continued enforcement of the present zoning amounts to an arbitrary, unreasonable and confiscatory action as affecting the property here involved.

The Court further finds that change of zoning from the present RAA use regulation to one which would permit the construction of apartments or hotels thereon would not materially affect the general zoning plan of the City of Miami Beach or materially damage the existing property or investment therein now made in ocean front apartments or hotels in the City of Miami Beach, Florida.

It is thereupon, ORDERED, ADJUDGED AND DECREED:

1. That Ordinance No. 289, adopted by the City of Miami Beach, Florida as it applies to the following described property:

> Lots 20, 21 and 22 of Indian Beach Corporation's Amended Subdivision, according to the plat thereof recorded in Plat Book 8 at page 61 of the Public Records of Dade County, Florida, together with that strip of land lying west of Collins Avenue and adjoining Indian Creek on the east, the northerly boundary line of which is the northerly boundary line of said Lot 22 extended westerly to Indian Creek and the southerly boundary line of which is the southerly line of said Lot 20 extended westerly to Indian Creek.

Lot 15 and South Half of Lot 16 of Indian Beach Corporation's Amended Subdivision, according to the plat thereof recorded in Plat Book 8 at page 61 of the Public Records of Dade County, Florida, together with that strip of land lying west of Collins Avenue and adjoining Indian Creek on the east, the northerly boundary line of which is the northerly boundary line of the South Half of said Lot 16 extended westerly to Indian Creek and the southerly boundary line of which is the southerly line of said Lot 15 extended westerly to Indian Creek.

Lot 17 and the N½ of Lot 16 of Indian Beach Corporation's Subdivision according to the amended plat thereof recorded in Plat Book 8 at Page 61 of the Public Records of Dade County, Florida, together with that strip of land lying west of Collins Avenue and adjoining Indian Creek on the east, the northerly boundary line of which is the northerly boundary line of Lot 17 extended westerly to Indian Creek and the southerly boundary line of which is the southerly line of the N½ of said Lot 16 extended westerly to Indian Creek..

is void and of no effect as it attempts to limit the use of such property to single family estate purposes.

2. That the several plaintiffs herein, owners of the above described property, are entitled to use said described property in such a manner as will permit the construction thereon of apartments or hotels.

3. That the defendant, City of Miami Beach, Florida, is enjoined from enforcing Ordinance No. 289 insofar as it limits the use of the several plaintiffs' properties hereinabove described to single family estate purposes.

DONE AND ORDERED at Miami, Dade County, Florida, this 8th day of May, 1956.

GRADY L. CRAWFORD
CIRCUIT JUDGE

(APPENDIX "C")

IN THE
SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1957

Case No. 28,639

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

vs.

PRESTON G. PREVATT, as ancillary administrator in Estate of Edith L. Trees, Deceased, et al.,

Appellees.

Case No. 28,640

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

vs.

GILDA DAHLBERG, a widow, and POLLY LUX, a free dealer,

Appellees.

Case No. 28,641

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

vs.

TEDLAND REALTY CORPORATION, a Florida corporation,

Appellee.

Opinion filed July 24, 1957

Appeals from the Circuit Court for Dade County, Grady L. Crawford, Judge

Ben Shepard, Joseph A Wanick and Anderson & Nadeau, for Appellant

Hoffman, Kemper & Johnson and Shutts, Bowen, Simmons, Prevatt & Julian, for Appellees

Warren, Klein & Moore and Sibley & Davis, for Intervenors

Drew, Judge.

These zoning cases were consolidated for trial in

the lower court and after trial a decree was entered favorable to the contention of the property owners that the zoning ordinance of the City of Miami Beach, which classified the three parcels of land involved in the litigation in the three suits as single family estates, was unconstitutional and void insofar as it applied to their lands. The trial court decreed that the property owners were entitled to use their lands in such manner as would permit the construction thereon of apartments or hotels and enjoined the city from enforcing the zoning ordinance insofar as it limited the use of several properties to single family estate purposes.

Following the entry of the decree of the lower court certain property owners in the affected area applied to the lower court for permission to intervene, which was denied. Certiorari was taken to this Court. The order denying the right of the property owners to intervene was quashed and the intervention was allowed. Wags Transportation System, Inc. v. City of Miami Beach, 88 So. 2d 751 (Fla. 1956). Thereafter the city and the intervenors appealed and the three suits were consolidated by this Court for consideration and are disposed of by this single opinion.

The subject zoning ordinance of the City of Miami Beach was adopted December 3, 1930 pursuant to Chapter 9837, Special Acts of 1923, and at a time when the population of the City of Miami Beach was about 6,000. The several parcels of land involved in this litigation are a part of a strip of land approximately a mile and a half in length from north to south between the Firestone estate and the Royal York Hotel property and lying between

Collins Avenue and the Atlantic Ocean. The 1930 ordinance classified this property in a manner which restricted its use to single family purposes. Its designation under the ordinance as single family estates has remained in effect from the date of the ordinance to this time. Similar land lying to the south of the aforementioned strip of land was classified in a like manner under the original zoning ordinance but in the case of City of Miami Beach v. First Trust Company, 45 So. 2d 681 (Fla. 1949), this Court held on rehearing that such original ordinance, insofar as it applied to the land involved in that litigation (the old Firestone estate consisting of some 7½ acres), was unconstitutional and void. The result of that decision was to reclassify the lands there in question for hotel and apartment house purposes. This decision was handed down in 1949 and marked the beginning of a long series of cases obviously designed to open up all of the property above described north of the Firestone estate for hotels and apartments.

The next case which appeared before us involving portions of this land was City of Miami Beach v. Lachman, 71 So. 2d 148 (Fla. 1953), wherein we reversed a decree of the trial court which held the ordinance aforesaid unreasonable and unconstitutional as to ten separate parcels of land lying within this area of approximately a mile and a half. In that case we again approved and confirmed the "fairly debatable" rule in zoning litigation which, it was argued, had been abandoned or overruled in City of Miami Beach v. First Trust Company, supra. On this subject and with reference to this rule, this Court said, speaking through Mr. Justice Mathews, in City of Miami Beach v. Hogan, 63 So. 2d 493, 494 (Fla. 1953):

"In the case of State ex rel. Office Realty Co. v. Ehinger, Fla., 46 So. 2d 601, decided May 30, 1950, which is subsequent to the opinion on rehearing in City of Miami Beach v. First Trust Company, supra, this court went back to its original holding in the case of State ex re. Taylor v. City of Jacksonville, supra, and City of Miami Beach v. Ocean and Inland Company, supra, to the effect that with reference to zoning, the court will not substitute its judgment for that of the municipality but will sustain the legislative intent of the ordinance if the matter is 'fairly debatable.'"

Reverting now to City of Miami Beach v. Lachman, supra, where we again affirmed and adhered to the "fairly debatable" rule—from which we have not since departed—we said:

"The effect of the trial court's ruling was to hold that the ordinance was unreasonable and not 'fairly debatable'. In so holding did he properly appraise the evidence? In its highly controversial state did the trial court substitute his judgment for that of the City Council, and under the circumstances was he warranted in doing so? The leading case in the country on the question is Village of Euclide, Ohio v. Amber Realty Company, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016, but we do not have to leave our own State in search of law to settle the point. In addition to the last cited case, appellant relies on State ex rel. Taylor v. City of

Jacksonville, 101 Fla. 1241, 133 So. 114, City of Miami Beach v. Elsalto Real Estate, Inc., Fla., 63 So. 2d 495, Segal v. City of Miami, Fla., 63 So. 2d 496, and State ex rel. Office Realty Company v. Ehinger, Fla., 46 So. 2d 601. Appellee relies on Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642, City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364, and City of Miami Beach v. First Trust Co., Fla., 45 So. 2d 681.

"Village of Euclide, Ohio v. Amber Realty Company approved the authority of a municipality to promulgate zoning regulations on the theory that the increase and concentration of population has developed and will continually require more restrictions in respect to the use of private property in urban centers. This case also promulgated the doctrine of legislative classification for zoning purposes and declared that if 'fairly debatable' it should be upheld. **The argument in the case at bar revolves around this doctrine."** (emphasis added)

Moreover, involved in the Lachman case was the vital question of the effect of a decree concerning ten very substantial portions of land in this questionable area on the entire zoning ordinance of the City of Miami Beach. We recognized the basic responsibility of the City Council in determining the appropriate classification of the property in the City under its zoning ordinances and in weighing this vital point and the fact that the Council of the City has exercised its judgment in declaring the property

to be properly zoned for residential estate purposes, we said in that case:

> "The amount of property involved is so great that to change its classification would be to necessarily affect the entire general zoning plan of the city. **These are matters for the city to settle and adjust and when they enter the picture the Court should not invade the city's authority absent a paramount constitutional right which is not shown in this case."** (emphasis added)

At the time the Lachman case was pending, we were also considering on certiorari the case of City of Miami Beach v. Kay, 71 So. 2d 725 (Fla. 1954). The property involved in the Kay litigation lay to the south and adjacent to the property which the City of Miami Beach was seeking to condemn and which is referred to in City of Miami Beach v. Hogan, supra, and City of Miami Beach v. Elsalto Real Estate, Inc., 63 So. 2d 495 (Fla. 1953). The property involved in the Lachman litigation adjoining the property then being condemned on the north. In the Kay case we held, on certiorari:

> "If and when the title to such lots for park purposes is acquired, we think the case is ruled by the City of Miami Beach v. First Trust Co., last cited. * * * If, however, the City of Miami Beach should fail to acquire the property for park purposes, then this case would be ruled by City of Miami Beach v. Lachman, 71 So. 2d 148, * * * *"

The effect of that holding at that time and under the conditions then prevailing was to say that if the City of Miami Beach acquired the land it sought to condemn and converted it to park purposes, such land would constitute a buffer zone which would properly separate the hotel and apartment property to the south from the residential area to the north.

The case of City of Miami Beach v. Lachman made its second appearance in this Court in 1956 and was disposed of by per curiam opinion. City of Miami Beach v. Lachman, 85 So. 2d 226 (Fla. 1956). In the per curiam opinion we acknowledged our familiarity with the history of the zoning litigation of Miami Beach affecting this large area of land and held that in applying the holdings of this Court in the numerous cases referred to therein, and previously discussed here, the bill of complaint failed to state a cause of action and should have been dismissed. It is to be observed, of course, that in that case we were reviewing an order of November 8, 1955 over-ruling a motion to dismiss a complaint relating to a factual situation concerning the Miami Beach zoning ordinances existing at a time prior to the date of the filing of the complaint.

From the very inception of the litigation involving this large area of land in 1949, every decision which this Court has written concerning it has basically rested upon the proposition that this Court would not substitute its judgment for that of the duly constituted officials of the City of Miami on the question of the use classification of these lands. We have discussed at great length in these cases the "fairly debatable" rule and every case we have decided rested upon this now well established principle of

the law of zoning. (Cf. City of Miami Beach v. Wiesen, 86 So. 2d 442 Fla. 1956). One cannot help but be impressed by the fact, in reading the numerous decisions that we have written on the subject, that every case presented to us was one which invoked weighty consideration in this Court and in which there was a wide divergence of views by the members of the Court. The conclusion is inescapable from these decisions that the scales were tipped in each instance in favor of the City because of the fact that they had exercised the judgment vested in them under law in favor of the single family residence classification.

The City of Miami Beach at the time of oral argument filed in this Court a statement as follows:

> "NOW COMES the appellant, City of Miami Beach, by its undersigned attorneys, and shows unto the Court that on the 17th day of April, 1957 the City Council of said City passed and adopted an ordinance amending Ordinance No. 289, commonly known as the 'Zoning Ordinance of Miami Beach, Florida', so as to permit the owners of the land which is the subject matter of the above styled causes to be used in such a manner as will permit the construction thereon of apartments or hotels, a certified copy of said ordinance being attached hereto."

Attached to the statement is a certified copy of such amended ordinance of the City of Miami Beach, the provisions of which, so far as they concern the land in this litigation and, as we understand it, all of the large sec-

tion of ocean front lands which so long have been in litigation permit the use of such lands for hotels and apartments in conformity to the provisions of the decree of the trial court which is now before us for review. The oral argument on this appeal was made not by counsel for the City but by counsel for the intervening property owners owning land in the affected area.

The principal point raised on the appeal and argued by appellant intervenors is completely undermined by the enactment of the amendatory ordinance. The basic contention of appellants in this appeal is that the reasonableness of the ordinance of the City of Miami Beach, (original ordinance #289 of 1930) which was declared void and unenforceable by the trial court, being "fairly debatable", the decree of the trial court holding the ordinance unconstitutional must be reversed in accordance with the previous holdings of this Court in the numerous cases which we have cited and discussed. Now that the ordinance of the City of Miami Beach classifies this property for use as hotel and apartments, the very argument made by appellant necessarily leads to an affirmance of the decree of the trial court. Cf. Gadsden County v. Kerce, 141 Fla. 596, 193 So. 772 (1940); Moody v. Volusia County, 93 Fla. 1115, 113 So. 563 (1927). Also see I Florida Law and Practice—Appeals Section 181, 182. The city fathers have determined, as they were directed to do in the decree here under review, that the ordinance which restricted this property to residential use is not warranted and have provided other uses therefor. The record reveils no basis on which we would be authorized to upset the decree nor anything that would be accomplished by doing so.

Another point urged by appellants is that under the doctrine of res judicata and stare decisis the matters and things set forth in the several complaints were foreclosed by the prior decisions of this Court. We cannot agree with this contention.

Without entering into an extended discussion of the subject, the doctrine of res judicata or estoppel by judgment is one which should be applied in zoning cases with great caution. It is, of course, an essential element, among others, of res judicata, that there be an identity of causes of action and this means an identity of the facts essential to the maintenance of the action. The former decisions of this Court relating to the validity of the zoning ordinance with reference to the lands in the large area under discussion were necessarily based upon the facts existing at that time. In fast growing areas, such as the City of Miami Beach, changes occur with great rapidity; it cannot, therefore, be said that, even where the same parties are involved, an adjudication of the reasonableness of a zoning ordinance at any given time is necessarily res judicata or constitutes an estoppel of judgment in subsequent litigation between the same or different parties. This question was dealt with and discussed by the Wisconsin Supreme Court in Ward v. Prospect Manor Corp., 188 Wis. 534, 206 N.W. 856. In that case the Wisconsin Court pointed out:

> " * * * The present decree acts only upon existing facts, and is based upon the conditions presently existing in the neighborhood. If and when conditions change, the court will have power to deal with such changed conditions with-

> out any embarrassment by reason of this decree. This decree declares the rights of the parties as they exist by reason of the present situation. It cannot affect a changed situation which may arise in the future. We do not think it necessary that the decree specifically authorize modifications as conditions in the neighborhood change. A decree or judgment disposes of the rights of the parties as they presently exist and as they appear from the evidence in the case."

On the same point, in the case of People v. Ocean Shore R. R. Inc., et al., 32 Cal. 2d 406, 196 P. 2d 570, 578-9, the California Court said:

> " * * * The doctrine does not apply, however, where there are changed conditions and new facts which did not exist at the time of the prior judgment. See Guardianship of Snowball, 156 Cal. 240, 242, 104 P. 444; Timm v. McCartney, 9 Cal. App. 2d 230, 235, 49 P. 2d 315; 15 Cal. jur. Sections 201, 214, pp. 154, 179. In the present case the facts are not the same, and the Spring Valley decision is not res judicata. * * * "

Even if all of the parties were identical, which they are not in these consolidated cases, and even if the action related to the same lands as in the former cases, which it does not, the record reveals changed conditions at the time of the entry of the decree appealed from which would render inoperative and inapplicable the principle of res judicata urged by the appellant.

Nothing in this opinion is to be construed as passing on the effect of the ordinance adopted by the City of Miami Beach on April 17, 1957 except insofar as it applies to the particular property involved in this appeal.

The decree entered in these consolidated cases is hereby affirmed.

TERRELL, C.J., HOBSON, ROBERTS & THORNAL, JJ., and JONES, Associate Justice, Concur

THOMAS, J., Not participating

IN THE SUPREME COURT OF FLORIDA
JULY TERM A. D. 1957
WEDNESDAY, JULY 24, 1957

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant

vs.

PRESTON G. PREVATT, as ancilliary administrator of the Estate of Edith L. Trees, Deceased, et al,

Appellees

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant

vs.

GILDA DAHLBERG, a widow, and POLLY LUX, a free dealer,

Appellees

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant

vs.

TEDLAND REALTY CORPORATION, a Florida corporation,

Appellee

These causes having heretofore been submitted to the Court upon the transcript of record of the decree herein, and briefs and argument of the counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and decreed by the Court that the said decree of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellees do have and recover of and from the Appellant their costs by them in this behalf expended except the $12.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the Court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice DREW was this day ordered to be filed.

(APPENDIX "D")

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

Case No. 28,639

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant

vs.

PRESTON G. PREVATT, an ancillary administrator in Estate of Edith L. Trees, Deceased, et al.,

Appellees

Case No. 28,640

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant

vs.

GILDA DAHLBERG, a widow, and POLLY LUX, a free dealer,

Appellees

Case No. 28,641

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant

vs.

TEDLAND REALTY CORPORATION, a Florida corporation,

Appellee.

PETITION FOR REHEARING

COME NOW the Intervenors by their undersigned attorneys and file this their Petition for Rehearing in which they seek an order or decree of the Supreme Court of Florida granting a rehearing of the opinion and decision filed in the above-entitled cause on July 24, 1957, and for grounds of such Petition, the intervenors aver:

GROUND ONE

The Supreme Court of Florida affirmed the decree of the lower court which rezoned certain ocean front property in the City of Miami Beach, as is described in the record, solely upon the ground that subsequent to the rendition of the final decree in the lower court, the City of Miami Beach had itself, by ordinance dated April 17, 1957, re-zoned the property involved here to-

gether with other property in such manner as will permit the construction of hotels thereon and that said ordinance conformed to the provisions of the decree of the trial court under review. Such ruling by this Honorable Court was contrary to the many rulings covering property in the same general area and this departure from the prior decisions of this Court was predicated entirely upon the act of the City Council of Miami Beach in re-zoning the property after the rendition of the said final decree.

The ordinance of the City of Miami Beach re-zoning said property was no part of the record made in the lower court. In fact, such ordinance had not been enacted at the time of the rendition of the final decree by the circuit court. At the time of oral argument, it was brought to the attention of the Supreme Court of Florida, that said amendatory ordinance re-zoning said property was itself under attack upon two grounds: (a) A sufficient number of electors of the City of Miami Beach had signed a petition which required the submission to the electors of the question of whether or not said amendatory ordinance would be repealed; and (b) The said amendatory ordinance was fraudulently enacted because one member of the Council, who constituted the necessary vote in order to pass said amendatory ordinance, owned a large part of the property involved, and that his vote for the amendatory ordinance re-zoning said property enhanced the value of his property more than one million dollars.

The City Council of the City of Miami Beach, as it is required to do under its charter, called a special elec-

tion in which the voters of Miami Beach were called upon to determine by their votes whether the said amendatory ordinance would be repealed. On August 6, 1957, the voters of Miami Beach overwhelmingly by a ratio of 3 to 1, as shown by certificate of the Clerk of the City of Miami Beach, hereto attached and made a part hereof by reference, marked Exhibit A, voted to repeal and did repeal said amendatory zoning ordinance, which constituted the sole basis for the decision and opinion of the Supreme Court of Florida.

Thus, the reason for the affirmance of the decree of the lower court has been swept aside through the vote of the people of Miami Beach whereby they repealed said amendatory ordinance, all of which was in conformance with and compliance of the provisions of the charter of the City of Miami Beach empowering the electors to repeal said amendatory ordinance. This action of the electors of the City of Miami Beach to repeal said amendatory ordinance was impelled by the sentiments expressed by the Supreme Court of Florida in this case authorizing intervention, namely: **Wags Transportation System, Inc. etc. et al. v. City of Miami Beach, etc., 88 So. 2d, 751, 752,** in which the Court said:

> " . . . Nothing is more sacred to one than his home and the petitioners should have been permitted to come in and bring their rights in this to the attention of the court. . . ."

The speculators who bought this ocean front property zoned as it was for residential purposes, would through the utilization of this 6,000 feet for hotels, wholly destroy

the City of Miami Beach as a city of beautiful homes, would create serious and dangerous traffic problems, would impose a tax burden upon the taxpayers of the City of Miami Beach of millions of dollars for the cost of building bridges, widening roads and furnishing facilities, would cause a stream of traffic composed of hundreds of thousands of cars to sweep through the residential areas, making the homes unfit for any uses except as boarding houses. The voters, residents and taxpayers of Miami Beach were not willing to sacrifice their city just to feather the nest of these speculators.

GROUND TWO

The intervention filed by these intervenors, which is a part of the record, and the petition for certiorari to the Supreme Court of Florida, which had to be prosecuted by the intervenors in order to become parties to this suit and which was fought vigorously by the City Council of the City of Miami Beach, set forth:

> " . . . petitioners are within the same zoning district as the property described in the complaints in the above-entitled consolidated causes; that the decree destroys the value of their property because each of the petitioners has a home situate upon said property and use the same for residential purposes, and therefore, the decree of the Circuit Court breaking these zoning restrictions and commercializing the district, renders their property much less suitable for residential purposes. . . ."

"Petitioners further aver that the representa-

tion of their interest by the City is or may be inadequate; . . .".

It appears that five-sevenths vote necessary to rezone said property depended upon a vote of a councilman who personally gained approximately one million dollars by his vote. Said amendatory ordinance was attacked in the lower court by another suit on this ground. If the ordinance were not repealed, the action of the City Council of Miami Beach is subject to a suit charging fraud in the enactment of said ordinance and which contends that the said amendatory ordinance is void.

Thus, the Supreme Court of Florida has affirmed the lower court solely upon the re-zoning ordinance which, we feel sure, will be declared void ab initio by reason of its fraudulent enactment. The Supreme Court of Florida in effect held that the question on appeal in this cause was moot because of the enactment of this amendatory ordinance, which ordinance is and was a fraud and void.

In short, the amendatory ordinance re-zoning the property which forms the basis of the decision of this Court in this cause that the question raised by this appeal is moot, is itself under attack because of its fraudulent adoption. Therefore, the lower court's order should be reversed so that the amendatory ordinance may stand or fall on its own merits. It would create an unseemly and grossly unfair situation for the decree of the lower court to be affirmed upon the basis of this amendatory ordinance, thus re-zoning the property, and then have this amendatory ordinance subsequently declared by the court to be a fraud and void.

CONCLUSION

For the reasons herein stated, the petitioners respectfully petition the Supreme Court of Florida to grant a rehearing in this cause because it is obvious that the basis for the affirmance of the decree of the lower court does not now in fact and law exist.

Respectfully submitted,

WARREN, KLEIN & MOORE and
SIBLEY, GRUSMARK, BARKDULL
& KING
Attorneys for Intervenors

By: s/ MARION E. SIBLEY
of counsel.

(APPENDIX "E")

IN THE
SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1957

WEDNESDAY, SEPTEMBER 18, 1957

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

-vs-

PRESTON G. PREVATT, as ancillary administrator in Estate of Edith L. Trees, Deceased, et al.,

Appellees.

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

-vs-

GILDA DAHLBERG, a widow, and POLLY LUX, a free dealer,

Appellees.

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

-vs-

TEDLAND CORPORATION, a Florida corporation,

Appellee.

The Intervenors, by their attorneys, have filed a petition for rehearing in the above appeals and in consideration of said petition the same is modified in the following particulars:

On page 10 of the mimeographed copy of opinion before the last paragraph beginning with the words, "The decree entered in these consolidated cases" insert the following paragraph:

"Moreover, the evidence in this record has been carefully examined by us and we think the conclusion is inescapable that, under the conditions existing as to the lands involved in this litigation at the time the chancellor entered his decree, the conclusion he reached is without error and should be affirmed, regardless of the subsequent enactment of the ordinance after the date of the final decree." Strike the opinion of Mr. Justice Roberts concurring specially.

The petition for rehearing having been visited to the modified opinion as above set forth is denied.

A True Copy
TEST:
/s/ GUYTE P. McCORD
Clerk Supreme Court.
(SEAL)

(THE MANDATES IN THE ABOVE CAUSES HAVE THIS DAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT FOR DADE COUNTY)

(APPENDIX "F")

IN THE

SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

Case No. 28,639

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

vs.

PRESTON G. PREVATT, as ancillary administrator in the Estate of Edith L. Trees, Deceased, et al.,

Appellees.

Case No. 28,640

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

vs.

GILDA DAHLBERG, a widow, and POLLY LUX, a free dealer,

Appellees.

Case No. 28,641

CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida,

Appellant,

vs.

TEDLAND REALTY CORPORATION, a Florida corporation,

Appellee.

PETITION TO RECALL MANDATE

COME NOW the appellants, WAGS TRANSPORTATION SYSTEM, INC., a corporation, MORRIS LANSBURGH and THERESA SCHAUER, by their undersigned attorneys, and file this, their petition and motion in which they seek and request an order of the Supreme Court of Florida recalling the Mandate in the above-entitled cause, and reinstating this cause on the docket of the Supreme Court of Florida for appropriate hearing and disposition, and for grounds thereof, they aver:

GROUND ONE

The Supreme Court of Florida adopted and assigned as the sole and only basis and ground for the affirmance of the decree of the lower court in its opinion of July 24, 1957, the fact that the City Council of the City of Miami Beach, after this appeal was perfected, had enacted a

rezoning ordinance which complied with the requirements of the decree of the lower court, thus **tipping the scales** in favor of the appellees and thus rendering moot the question raised upon this appeal. These appellants, by petition for rehearing directed solely to the ground and basis for this judgment and opinion, pointed out and established in this record that the qualified electors of the City of Miami Beach had, on August 6, 1957, by an initiative and referendum election, repealed the said ordinance which formed the sole basis for the prior opinion and judgment of affirmance. The Supreme Court of Florida, recognizing that said petition was well founded, valid and meritorious, thereupon amended its prior opinion and judgment and by said amendment assumed, adopted and assigned an entirely new and different ground and basis for its prior judgment. This, in fact, was an admission upon the record that the petition for rehearing was granted. Notwithstanding this shift in position in face of this petition for rehearing, the Supreme Court of Florida did not accord these Appellants the right of a rehearing to which they were entitled under the universal rule applied by the Supreme Court of Florida in all other cases.

Thereupon, the Supreme Court of Florida **"visited"** the petition for rehearing to the amended opinion to which it had not been directed, and to which it was obviously not applicable, and denied said petition. Upon the **"amended"** opinion, judgment of affirmance was pronounced by the Supreme Court of Florida and its Mandate was issued to the lower court. Thus, these appellants were deprived of the right to question by further petition for rehearing the obvious fault of the amended opinion.

This right denied is not a mere concession to technicality in view of the estoppel by judgment which arises by virtue of the judgment of this Court in the case of **The City of Miami Beach v. Ralph Lachman and Jean Lachman, 85 So. 2d, 226,** to which the above-entitled causes were bound by an order of consolidation in the lower court. Thus, these acts of the Supreme Court of Florida, done unexpectedly at the end of the proceedings, and which could not be contemplated by these appellants, deprived these appellants of due process of law and the equal protection of the law guaranteed to them by the Fourteenth Amendment of the Constitution of the United States. See,

Saunders v. Shaw, 244 U. S. 317, 37 Sup. Ct. Rep. 638.

GROUND TWO

At the time this cause was set for oral argument before the Supreme Court of Florida, the appellees filed and argued a motion to affirm because it was urged that the question on appeal had been rendered moot by an ordinance adopted on April 17, 1957 by the City Council of the City of Miami Beach, rezoning the property involved in compliance with the decree of the lower court. The Supreme Court of Florida entertained said motion and counsels' arguments were directed largely to the legal sufficiency of this motion. In actuality the appeal was not truly then heard on its merits. The opinion and judgment of the Supreme Court of Florida of July 24, 1957, in substance sustained this motion to affirm on the grounds therein urged. Thus, in reality, these appellants have not been afforded an opportunity to orally argue said appeal on its merits. Thereafter, on August 6th, the qualified

electors of Miami Beach repealed said rezoning ordinance by an initiative and referendum election. Petition for rehearing was filed by these appellants setting forth and establishing in this record that the ground and basis for said judgment and opinion no longer existed because of the repeal of said ordinance. Thereafter, the Supreme Court of Florida in effect abandoned said opinion by an amendment dated September 18, 1957, which sustained the prior judgment of July 24th upon an entirely different basis, namely, the sufficiency of the evidence to sustain the lower court's decree. Thereafter, the Supreme Court of Florida, without the knowledge or consent of these appellants, **"visited"** these appellants' petition for rehearing to the amended opinion to which it was obviously not directed and to which it was palpably not applicable. Thereupon, the Supreme Court of Florida denied said petion for rehearing and issued its Mandate. This conduct of the Supreme Court of Florida constitutes state action which deprives these appellants of due process of law and the equal protection of the law guaranteed to them by the fourteenth Amendment of the Constitution of the United States.

GROUND THREE

The Supreme Court of Florida based its former judgment of July 23, 1957, solely on the ground that the City of Miami Beach had rezoned the property here involved in compliance with the lower court's decree. These appellants' petition for rehearing was addressed of necessity to this sole ground of the opinion and judgment and said petition in effect was found by the Supreme Court of Florida to be meritorious. Orderly procedure and an ad-

herence to established and rock-ribbed principles universally announced and recognized by the Supreme Court of Florida impelled an order granting said petition with the consequent suspension of said judgment pending a **rehearing** and a reconsideration of the case. The amendment to the opinion indirectly admitted the validity of the petition for rehearing and adopted an entirely new ground as the basis of the Supreme Court of Florida's judgment of July 24, 1957. The "visiting" of the petition for rehearing to the amended opinion (of September 18, 1957) to which it was obviously not applicable, deprived these appellants no longer had any right to add to the rec- to all others. See, **6 Fla. 37. (Lines v. Darden).**

Thus, the Supreme Court of Florida by its own act done unexpectedly at the end of the proceeding, when these appellants no longer had any right to add t othe record by another petition for rehearing under Rule 3.14(e) of the Florida Appellate Rules, has denied to these appellants due process of law and the equal protection of the law as guaranteed to these appellants by the Fourteenth Amendment of the Constitution of the United States.

GROUND FOUR

The Supreme Court of Florida, in amending its opinion by abandoning the sole basis for the initial affirmance of the lower court after these appellants' petition for rehearing est blished that the initial basis was unsupportable, and, the Supreme Court of Florida, by assuming an entirely new and different ground for affirmance, in effect granted the petition for rehearing, yet it

denied these appellants the benefit of such petition for rehearing and denied these appellants the recognized and established consequences therefrom, namely, the suspension of the previous appellate judgment pending a rehearing and reconsideration of the case. See, **Florida Motor Lines v. Hill, 143 So. 261, 262.** In so doing, the Supreme Court of Florida denied these appellants the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

GROUND FIVE

The Supreme Court of Florida has inadvertently denied these appellants due process of law and the equal protection of the law guaranteed to them by the Fourteenth Amendment of the Constitution of the United States for that the Supreme Court of Florida has rendered a final judgment and decree of affirmance in the above-entitled cause without affording to these appellants the right to file a petition for rehearing to said opinion and judgment.

WHEREFORE, these appellants respectfully move this Honorable Court to render its order as follows:

(a) Recall the Mandate in the above-entitled cause and reassume jurisdiction of this cause.

(b) Re-set the cause upon rehearing for oral argument, or in the alternative,

(c) Permit these appellants to file petition for re-

hearing to the amended opinion and judgment, within a time to be specified.

(d) Afford to these appellants the procedure and rights heretofore granted to all litigants under the circumstances set forth in this motion.

Respectfully submitted,

WARREN, KLEIN & MOORE and
SIBLEY, GRUSMARK, BARKDULL
& KING

Attorneys for Appellants aforesaid.

By: MARION E. SIBLEY,
of counsel.

SUPREME COURT OF FLORIDA

Tallahassee

October 10, 1957

Messrs. Sibley, Grusmark, Barkdull & King
Attorneys at Law
605 Lincoln Road
Miami Beach, Florida

Atten' on: Mr. Barkdull

Dear Mr. Barkdull:

I have examined your petition to recall mandate in City of Miami Beach vs. Prevatt et al. I have also submitted it to the court who adjudicated this case and they are of the view that it amounts to a petition for rehearing, the second which has been filed in the cause contrary to the rules and should be returned to you.

Sincerely

GLENN TERRELL
Chief Justice

GT:LR
cc: Clerk of Supreme Court

(APPENDIX "G")

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1956

SPECIAL DIVISION B.

Case No. 26,717

THE CITY OF MIAMI BEACH, a municipality created and existing under the Laws of the State of Florida,

Petitioner,

vs.

RALPH LACHMAN and JEAN LACHMAN

Opinion filed February 8, 1956

A Writ of Certiorari to the Circuit Court for Dade County, George E. Holt, Judge

Ben Shepard, Joseph A. Wanick and Anderson & Nadeau, for Petitioner.

Ben Cohen, for Respondents.

ON PETITION FOR REHEARING

PER CURIAM:

On November 18, 1955, petition for writ of certiorari

was denied without opinion. Upon petition for rehearing we have re-examined the entire record in the light of the extensive litigation affecting lands in the particular area where the land involved in this cause is situated.

The court is thoroughly familiar with the history of this litigation as reflected by our opinions in City of Miami Beach v. Hogan, 63 So. 2d 493; City of Miami Beach v. Elsalto Real Estate, 63 So. 2d 495; City of Miami Beach v. Lachman, 71 So. 2d 148; and City of Miami Beach v. Kay, 71 So. 2d 725. Upon applying the holdings of these cases to the amended bill of complaint in the case before us, we are now led to the conclusion that the amended bill of complaint failed to state a cause of action and should have been dismissed.

We, therefore, recede from our previous order denying the petition for certiorari, and the petition is hereby granted, and the order denying the motion to dismiss the amended complaint is hereby quashed, with directions to the lower court to enter an order dismissing the amended complaint.

DREW, C. J., THOMAS, THORNAL AND O'CONNELL, JJ., CONCUR.

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FILED
FEB 25 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 731

WAGS TRANSPORTATION SYSTEM, INC., a corporation; MORRIS LANSBURGH, and THERESA SCHAUER,

Petitioners,

v.

PRESTON G. PREVATT, as Ancillary administrator, of the Estate of EDITH L. TREES, Deceased; GILDA DAHLBERG, a widow; POLLY LUX, a freedealer; TEDLAND REALTY CORPORATION, a Florida corporation,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION BRIEF

THOMAS H. BARKDULL, JR.
LOUIS L. LaFONTISEE, JR.
MARION E. SIBLEY
Attorneys for Petitioner

Of Counsel:
SIBLEY, GRUSMARK, BARKDULL & KING
605 Lincoln Road
Miami Beach, Florida

IN THE

SUPREME COURT OF THE UNITED STATES

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WAGS TRANSPORTATION SYSTEM, INC., a corporation; MORRIS LANSBURGH, and THERESA SCHAUER,

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Respondents.

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION BRIEF

ARGUMENT

RESPONDENTS' POINT 1

Respondents urge that the time for filing a petition

for certiorari in this court had already expired prior to December 5, 1957, when petitioners filed their application for extension of time in this court.

The original judgment and opinion in the Supreme Court of Florida was entered on July 24, 1957. The petition for rehearing was denied by the court on September 18, 1957. The extension of time within which the petition for certiorari was granted by Justice Hugo L. Black on December 5, 1957, 78 days after the denial of the petition for rehearing and the issuance of the mandate.

It is well established that where the rules of the lower court allow petition for rehearing or new trial to be filed within a prescribed number of days and the petition is filed within that period, the ninety days begin to run from the date of the lower court's order denying the petition for rehearing. (Dept. of Banking v. Pink, 317 U.S. 264, 266; Pfister v. Northern Ill. Financial Corp., 317 U.S. 144.)

Even the case cited by the respondents in support of their erroneous contention is contra to their position. (Gypsy Oil Co. v. Escoe, 48 S. Ct. 112, 257 U.S. 498, 72 L. Ed. 393.) There, the court, determined that the mere application for leave to file a second petition for rehearing did not toll the time within which to petition for certiorari, but further stated:

> "If, however, a timely motion to file a second petition is granted and the petition is actually entertained by the court, then the time within which application may be made here for certiorari **begins to run from the day when the**

court denies such second petition." (Emphasis supplied)

The time within which the petition may be filed runs from the day the judgment becomes final. The date of the finality of the judgment of an appellate court is determined by state rules. In Florida, such a judgment does not become final until the mandate is issued to the trial court. (State v. City of Clearwater 108 Fla 635, 146 So 836) In the case at bar, the mandate was issued to the trial court on September 18, 1957. (Pet. App-E, p. 62)

For these reasons, it must be concluded that the contention of the respondents that the petition for writ of certiorari was not within the time allowed by the rules of this court is wholly without merit.

RESPONDENTS' POINT 2

Respondents urge that the federal question was never properly raised in the Florida court since such a question was first raised in the petition for recall of mandate, which was submitted contrary to the rules of the Florida court.

The petitioners brough to the attention of the Florida Supreme Court the fact that they had been deprived of rights in violation of the due process clause and equal protection clause of the Fourteenth Amendment of the U. S. Constitution. It is the respondents' contention that because the petition to recall mandate was not enterained by the court and because the federal question so raised was never determined the petitioners have failed to meet the condition subsequent to review on certiorari.

Though it is the Petitioners' position that the Florida Supreme Court was in error in construing the petition to recall mandate as a second petition for rehearing, under the doctrine of Saunders v. Shaw 244 U.S. 317, 37 Sup Ct Rep 312, a ruling on that point is not necessary to determine whether or not the Federal Question was properly raised in these proceedings.

In that case Justice Holmes speaking for the court said:

> "The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course, ordinarily, that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of Constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence is heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation (citations omitted). It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of Constitutional right to the attention of the Chief Justice of the State by his

assignment of errors. We do not see what more he could have done."

The principles above set forth are clearly applicable to the case at bar.

RESPONDENTS' POINT 3

Respondents urge that all decisions by the Florida courts in the case at bar--including the trial court's decree, the Supreme Court's judgment and opinion, the Supreme Court's ruling on the petition for rehearing, and the Supreme Court's ruling on the petition to recall mandate—were decided solely on the basis of local law and local rules.

It is stated by the respondents, in their argument under this Point, that:

> "Nothing in the petition for certiorari discloses any error by the Florida courts in judging the evidence or in applying the substantive law. All questions raised by the petitioners are procedural matters in no way affecting the fundamental decision."

The Supreme Court of Florida, in entertaining a matter outside the record and further, in basing its decision upon such a matter, acted in derogation of its own Rule 31, which provides:

> "Appeals will be heard and determined on assignments of error, appendices and briefs filed in accordance with the rule of this court; but,

> the record on appeal will be referred to when necessary to settle certain conflicts between the parties. **No assignments of error or matter contained in an appendix will be considered unless it is properly based on the record on appeal.**" (Emphasis supplied)

Further, the Supreme Court of Florida found it necessary to amend its opinion of July 24, 1957, to include in that opinion the fact that the record in the lower court sufficiently established a ground for affirmance of the trial court's decree. The necessity of this amendment makes it apparent that the Supreme Court of Florida recognized that the petition for rehearing was well founded and had properly attacked their prior opinion. Then, in an unprecedented action, that court visited this petition for rehearing to the amended opinion, denied it, and cut off any rights of the petitioners to question the amended opinion. There are no rules, local or otherwise, which justify such procedure. Thus, the petitioners were denied the right to be heard in this matter and have been denied substantive due process of law and the equal protection of the law by the Florida Supreme Court's failure to apply its own procedural rules in a uniform and just manner.

RESPONDENTS' POINT 4

Respondents urge that the question presented by the petitioners and their statement of reasons for granting a writ of certiorari reveal that their sole grounds for invoking the Fourteenth Amendment of the Federal Constitution is that the Florida Supreme Court did not grant them a rehearing under Florida law. A rehearing is not

a matter of right but rests in the sound judicial discretion of the court.

Even a cursory reading of the petition reveals that the above is an inaccurate statement of the grounds for invoking the Fourteenth Amendment to the Federal Constitution. An examination of the question presented, appearing on pages 3 and 4 of the petition, clearly sets forth the manner in which the petitioners were deprived of their federal constitutional rights.

It is also the contention of the respondents that the petition for rehearing filed by the petitioners "attacked the judgment of the Florida Supreme Court on a merely collateral issue and completely failed to point out any error in the actual ratio on decidenda of the judgment". The so-called collateral issue referred to by the respondents is the amendatory ordinance improperly considered by the Florida Supreme Court in reaching its decision of July 24, 1957. A brief quotation from the opinion sufficiently establishes that this was the primary and determining factor in that decision:

> "The principal point raised on the appeal and argued by appellant intervenors is **completely undermined** by the enactment of the amendatory ordinance." (Emphasis supplied)

The amendment to the opinion of July 24, 1957, (A-E) mentions, for the first time, that the record in the trial court was in any way an adequate basis for the affirmance of the trial court's injunctive decree. With this amendment, the court denied the petition for rehearing stating:

"The petition for rehearing having been visited to the modified opinion as above set forth is denied."

This order clearly precluded the petition from questioning the efficacy of the amended opinion by petition for rehearing.

RESPONDENTS' POINT 5

Respondents urge that the petition for certiorari reveals, on its face, that there are no special and important reasons for granting it, as required by Rule 19 of this court.

The reasons for granting the writ of certiorari, as contained in the petition, pages 10 to 15, clearly establish the consideration of the questions in the case at bar to be a matter of great importance and far-reaching effect necessary to satisfy the jurisdiction of the Supreme Court of the United States.

Respectfully submitted,

THOMAS H. BARKDULL, JR.
LOUIS L. LaFONTISEE, JR.
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SUPREME COURT, U. S.

FILED
FEB 1 1 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 731

WAGS TRANSPORTATION SYSTEM, INC., a corporation; MORRIS LANSBURGH, and THERESA SCHAUER,

Petitioners,

v.

PRESTON G. PRIVATT, as Ancillary Administrator of the Estate of EDITH L. TREES, Deceased; GILDA DAHLBERG, a widow; POLLY LUX, a freedealer; TEDLAND REALTY CORPORATION, a Florida corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARL T. HOFFMAN,
G. KENNETH KEMPER,
WYATT JOHNSON,
Attorneys for Respondents.

Of counsel:
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1115 duPont Building
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 731

WAGS TRANSPORTATION SYSTEM, INC., a corporation; MORRIS LANSBURGH, and THERESA SCHAUER,

Petitioners,

v.

PRESTON G. PREVATT, as Ancillary Administrator of the Estate of EDITH L. TREES, Deceased; GILDA DAHLBERG, a widow; POLLY LUX, a freedealer; TEDLAND REALTY CORPORATION, a Florida corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is filed by the Respondents in this cause, in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Florida, filed by the Petitioners herein. This brief is filed under the provisions of Supreme Court Rule No. 24 for the purpose of disclosing to the Court matters or grounds why the cause should not be reviewed by the Supreme Court of the United States.

Respondents reserve their right to file an additional brief on the merits under Supreme Court Rule No. 41, if certiorari is granted by the Court.

JURISDICTION

Petitioners' jurisdictional statement in the Petition (Petition, Page 2) shows on its face that the time for filing such a petition had already expired prior to December 5, 1957, when petitioners filed their Application for Extension of Time in the Supreme Court of the United States. This matter will be more fully argued hereinafter.

Respondents also wish to supplement petitioners' jurisdictional statement by bringing to the Court's attention the letter of The Honorable Glenn Terrell, Chief Justice of the Supreme Court of Florida, which is shown at Page 71 of the Petition, but which bears no separate appendix designation. This letter states that petitioners' "Petition to Recall Mandate" was filed contrary to the rules of the Supreme Court of Florida and was, therefore, returned to the petitioners by the Chief Justice of that Court. The Petition for Certiorari later shows that the Federal question here presented was raised only in said "Petition to Recall Mandate" (Petition, Page 9). Thus the Federal question was never properly raised in the State court since the only document in which it was raised was filed contrary to the rules of the State Court.

QUESTION PRESENTED (by Petitioners)

In the present brief, respondents do not propose to argue the merits of the question presented by petitioners

except insofar as the question shows on its face why this cause should not be reviewed by the Supreme Court of the United States.

The question presented shows on its face that it should not be reviewed by the Supreme Court of the United States because the question reveals that the Supreme Court of Florida did not decide a Federal question as defined in Rule 19 of the United States Supreme Court Rules. Instead, the Petition reveals that the so-called "Federal question" was first raised by petitioners in their "Petition to Recall Mandate", and that said "Petition to Recall Mandate" was not accepted by the Supreme Court of Florida because it was filed contrary to the rules of that court. (See letter of Mr. Chief Justice Terrell, shown at Page 71 of the Petition for Certiorari.)

In addition, the Petition for Certiorari itself reveals that the decision of the Supreme Court of Florida, as expressed in its opinion (97 So. 2d 473), was based entirely on non-Federal grounds.

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains much that is irrelevant here and also includes several statements that may be misleading to the Court.

First of all, the actual amount of land involved in the present proceeding is six lots, each one hundred feet wide. The trial court decreed that the Miami Beach Zoning Ordinance (Ordinance No. 289) was void and of no effect as it attempts to limit the use of such six hundred feet of property to single-family estate purposes, and

enjoined the City of Miami Beach from enforcing that ordinance insofar as it so limits the use of respondents' property. It also decreed that the respondents are entitled to use their said six hundred feet of land in such a manner as will permit the construction thereon of apartments or hotels.

The City of Miami Beach appealed this decree to the Supreme Court of Florida and the present petitioners were permitted to intervene in that appeal, although they had taken no part in the proceedings in the trial court. The City and the intervenors then jointly filed a brief on the merits in the Supreme Court of Florida.

At the time of oral argument, the City of Miami Beach filed a statement advising the Court that the City had passed an amendatory ordinance, which ordinance rezoned the strip of land approximately one and one-half miles long, which included the six hundred feet owned by the respondents, and which ordinance would permit the use of the whole strip including respondents' six hundred feet of land for apartment and hotel uses. (See opinion of the Supreme Court of Florida; Petition, Pp. 45-46.)

The intervenors (petitioners here) had full opportunity to present their arguments orally to the Supreme Court of Florida and, in fact, they did so.

The Supreme Court of Florida then entered its judgment and opinion on July 24, 1957, affirming the trial court. This judgment by no means rested solely on the passage of the amendatory ordinance but rather the opinion rests on the whole record of the cases and covers

the various points raised by the intervenors, such as res judicata, stare decisis and estoppel by judgment.

The intervenors (petitioners here) then filed a Petition for Rehearing in which they completely ignored the other grounds for the decision of the Supreme Court of Florida and merely advised the Court that the amendatory ordinance had been repealed by referendum. (Petition, Appendix "D", Pp. 53-59).

The Supreme Court of Florida, in its original opinion, had stated:

> "The record reveals no basis on which we would be authorized to upset the decree nor anything that would be accomplished by doing so."

On September 18, 1957, The Supreme Court of Florida added to its original opinion the following: (Petition, Appendix "E", Pp. 61-62)

> "Moreover, the evidence in this record has been carefully examined by us and we think the conclusion is inescapable that, under the conditions existing as to the lands involved in this litigation at the time the chancellor entered his decree, the conclusion he reached is without error and should be affirmed, regardless of the subsequent enactment of the ordinance after the date of the final decree."

The Supreme Court of Florida then denied the Petition for Rehearing.

Thus, at this point of the proceedings, no Federal question had been raised, and the Supreme Court of Florida had decided the case solely on local issues—the evidence itself, and local law pertaining to zoning, estoppel by judgment, res judicata and stare decisis.

Moreover, Rule 3.14 (e) of the Florida Appellate Rules provides:

> "e. Only One Petition Allowed. The petitioner shall be entitled to file only one petition for rehearing with respect to the particular decision and no further petition or motion will be received or filed by the clerk or considered by the Court."

The petitioners themselves recognize this rule, for in their subsequent Petition to Recall Mandate (Petition, Appendix "F", P. 68), they say, inter alia: " * * * these appellants no longer had any right to add to the record by another petition for rehearing under Rule 3.14 (e) of the Florida Appellate Rules * * * ".

Nevertheless, the petitioners then proceeded to file their so-called "Petition to Recall Mandate," which prayed the Court to "re-set the cause upon rehearing for oral argument or, in the alternative, permit these appellants to file petition for rehearing to the amended opinion and judgment, within a time to be specified." (Petition, Appendix "F", Pp. 69-70).

Thus the Petition to Recall Mandate itself admitted that it was filed in violation of the rules of the Florida Supreme Court.

The Honorable Glenn Terrell, Chief Justice of the Supreme Court of Florida, then returned the Petition to Recall Mandate to the petitioners, saying: (Petition, Appendix "F", P. 71)

> "I have examined your petition to recall mandate in City of Miami Beach v. Prevatt et al. I have also submitted it to the court who adjudicated this case and they are of the view that it amounts to a petition for rehearing, the second which has been filed in the cause contrary to the rules, and should be returned to you."

HOW FEDERAL QUESTION WAS PRESENTED

On Page 9 of their Petition for Certiorari, the petitioners allege that the Federal question was raised in these proceedings solely in the so-called Petition to Recall Mandate which admittedly was submitted in violation of the rules of the Florida Supreme Court, and which was returned to the petitioners by that Court because it was contrary to those rules.

To justify this unique procedure, petitioners cite the case of **Chapman v. St. Stephens Protestant Episcopal Church, Inc., et al., 105 Fla. 683, 138 So. 630.** This case by no means requires the Supreme Court of Florida to grant a second petition for rehearing and, in fact, that case was decided in 1932 long before the present Florida Appellate Rules were adopted and long before the Supreme Court specifically adopted a rule forbidding the filing of a second petition for rehearing. The petitioners also cite the case of **Saunders v. Shaw, 244 U.S. 317, 37 Sup. Ct. Rep. 638, 61 L. Ed. 1163.** In that case, the plaintiff in error

had never been permitted to present his evidence at all in the trial court. In the present case, the present petitioners made no attempt to intervene in the case until after final decree in the trial court and they intervened only for the purpose of appeal and have never attempted to add to the trial record in these cases. In the Saunders case, the Federal question arose, not because the State Court had refused to permit a second petition for rehearing, but because that Court had decided the case without permitting the plaintiff in error to introduce his evidence in the trial court. In the present case, the petitioners have never attempted to introduce evidence in the trial court; they intervened, after final decree, solely for the purpose of appeal. In the appeal, they have exercised every right to which an appellant is entitled under the Florida practice—the right to file a brief, the right to oral argument, and the right to file one petition for rehearing.

Thus it is apparent that the Supreme Court of Florida did not decide a Federal question, that it decided the case solely on non-Federal grounds, that the so-called Federal question was raised only in a Petition to Recall Mandate which was itself contrary to the rules of the Florida Supreme Court, and that the Florida Supreme Court did not deprive the present petitioners of any right or due process of law.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

As intimated in the foregoing portions of this brief, there are numerous reasons why this cause should not be reviewed by the Supreme Court of the United States, which may be summarized as follows:

1. The time for filing a Petition for Certiorari in this Court had already expired prior to December 5, 1957, when petitioners filed their Application for Extension of Time in this Court. (Judgment of Florida Supreme Court was entered on July 24, 1957).

2. The Federal question was never properly raised in the Florida court since such a question was first raised in the Petition for Recall of Mandate, which was submitted contrary to the rules of the Florida Supreme Court.

3. All decisions by the Florida courts in the case at bar—including the trial court's decree, the Supreme Court's judgment and opinion, the Supreme Court's ruling on the Petition for Rehearing and the Supreme Court's ruling on the Petition to Recall Mandate—were decided solely on the basis of local law and local rules.

4. The question presented by petitioners and their statement of reasons for granting a writ of certiorari reveal that their sole grounds for invoking the Fourteenth Amendment to the Federal Constitution is that the Florida Supreme Court did not grant them a rehearing. Under Florida law, a rehearing is not a matter of right, but rests in the sound judicial discretion of the Court.

5. The Petition for Certiorari reveals on its face that there are no "special and important reasons" for granting it, as required by Rule 19 of this Court.

ARGUMENT

1. The time for filing a Petition for Certiorari in the Supreme Court of the United States had already expired prior to December 5, 1957, when petitioners filed their Application for Extension of Time in this Court.

The Petition for Certiorari (Page 2) states that the **judgment** of the Florida Supreme Court was entered on July 24, 1957.

Rule 34 (2) of this Court states:

> "Whenever any justice of this court is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, an application seeking such extension shall be timely if it is presented to the clerk **within the period sought to be extended.** The clerk will refuse to receive any application for extension sought to be presented after expiration of such period." (Emphasis added)

Title 28, Section 2101 (c), U.S.C., provides:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for **within ninety days after the entry of such judgment or decree.** A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for

a period of not exceeding sixty days." (Emphasis added)

Petitioners, in their petition (Page 2), concede that "The **judgment** of the Florida Supreme Court in its original form **was entered on July 24, 1957.**"

The ninety-day period beginning on July 24, 1957, expired on October 22, 1957, while the petitioners did not apply for any extension of time in this Court until December 5, 1957. However, this Court has held that the running of the ninety-day period is suspended during the time that a timely petition for rehearing is pending. **Gypsy Oil Co. v. Escoe, 48 S.Ct. 112, 275 U. S. 498, 72 L. Ed. 393.**

Here, the petition for certiorari states that the petition for rehearing was filed on August 21, 1957, and was denied on September 18, 1957—a period of twenty-eight days. Assuming that the ninety-day period began running on July 24, 1957, but was suspended during the twenty-eight day period the petition for rehearing was pending, the ninety-day period then expired on November 20, 1957.

Under either interpretation of the rule, the petitioners' Application for Extension of Time, filed in this Court on December 5, 1957, was filed too late, and this Court no longer had jurisdiction of the cause.

The second petition for rehearing (styled "Petition to Recall Mandate") does not, of course, suspend the time for applying for certiorari, under the doctrine of Gypsy Oil Co. v. Escoe, supra.

2. The Federal question was never properly raised in the Florida court since such a question was first raised in the Petition for Recall of Mandate which was submitted contrary to the rules of the Florida Supreme Court.

Petitioners concede that the so-called "Federal question" was first raised by them in their "Petition to Recall Mandate" (Petition, Page 9). This Petition to Recall Mandate was, in fact, a second petition for rehearing since its prayer is a prayer for rehearing. (Petition, Appendix "F", Pp. 69-70).

Filing of the Petition to Recall Mandate was refused by the Chief Justice of the Supreme Court of Florida on the ground that it was contrary to the rules of that Court. (Petition, Appendix "F", Page 71).

Section 3.14 (e) of the Florida Appellate Rules, relating to rehearings, states:

> "(e) **Only One Petition Allowed.** The petitioner shall be entitled to file only one petition for rehearing with respect to the particular decision and no further petition or motion will be received or filed by the clerk or considered by the Court."

The general rule is that a claim of Federal question first made in an application for leave to file a second petition for rehearing comes too late. **Bilby v. Stewart, Okl. 1918, 38 S.Ct. 264, 246 U. S. 255, 62 L. Ed. 701; Rooker v. Fidelity Trust Co., Ind. 1923, 43 S.Ct. 288, 261 U. S. 114, 67 L. Ed. 556; Wall v. Chesapeake, etc., R. Co., 1921, 41 S.Ct. 402, 256 U. S. 125, 65 L. Ed. 856. See also, McMillen**

v. Ferrum Min. Co., Colo. 1905, 25 S.Ct. 533, 197 U. S. 343, 49 L. Ed. 784.

The Florida Supreme Court, of course, never considered or passed upon any Federal question inasmuch as the Federal question was first raised in the Petition to Recall Mandate, which the Florida court refused to consider because it was filed contrary to its rules. **See Scott v. Platt, 1943, 137 P. 2nd, 975, 171 Or. 379.**

Petitioners attempt to evade the operation of this general rule by relying on the "surprise" doctrine of Saunders v. Shaw, 37 S.Ct. 638, 244 U. S. 317, 61 L. Ed. 1163.

An examination of Saunders v. Shaw (supra) reveals that it is totally inapplicable to the case at bar. In Saunders v. Shaw, the trial court held for defendant, without hearing defendant's evidence on all points. The Supreme Court of Louisiana first affirmed this judgment; then, on rehearing, it granted an injunction against the defendant. Defendant petitioned for rehearing but the Louisiana court refused because there had already been one rehearing (at the instance of the plaintiff). The Supreme Court of the United States then accepted jurisdiction of the case on defendant's writ of error, solely on the ground that defendant had been deprived of due process because defendant had never had an opportunity to put on all its evidence.

The case at bar presents a far different situation as is revealed by a summary of the progress of the case:

a. Petitioners were not parties to the case in the trial court and made no attempt to introduce evidence there.

b. Petitioners were allowed to intervene in the case solely for the purpose of taking an appeal "in subordination to and in recognition of the main proceeding." **Wags Transportation Co. v. City of Miami Beach, Fla. 1956, 88 So. 2d 751.**

c. On appeal, petitioners were allowed to file a brief and to argue the case orally.

d. The Supreme Court of Florida then entered its judgment of affirmance on July 24, 1957. In its opinion, it passed on the points raised by petitioners (then intervenor-appellants) such as res judicata, stare decisis, estoppel by judgment, and the evidence shown in the record as a whole, saying, inter alia, "The record reveals no basis on which we would be authorized to upset the decree nor anything that would be accomplished by doing so." The Court also discussed the amendatory ordinance, but its decision by no means rested on that ground. (See opinion, Petition, Appendix "C", Pp. 37-49).

e. Petitioners were then allowed to file a petition for rehearing, and did so. (Petition, Appendix "D", Pp. 53-59). This petition for rehearing raised two grounds, both of which argue the invalidity of the amendatory ordinance which was not a part of the trial record and which was not the basis of the Florida Supreme Court's decision.

f. The Supreme Court of Florida denied the petition for rehearing and in its order it emphasized that

the case had been decided on the whole record, saying (Petition, Appendix "E", Pp. 61-62):

> "Moreover, the evidence in this record has been carefully examined by us and we think the conclusion is inescapable that, under the conditions existing as to the lands involved in this litigation at the time the chancellor entered his decree, the conclusion he reached is without error and should be affirmed, regardless of the subsequent enactment of the ordinance after the date of the final decree."

g. Petitioners had then received every possible benefit of due process of law under Florida practice and, in fact, they had been specially favored in view of the fact that they had made no attempt to intervene in the case until after entry of the final decree. Despite this fact, however, the petitioners now filed a "Petition to Recall Mandate", which again prayed for a rehearing, contrary to the Florida Appellate Rules, and their petition was denied for that reason.

In view of this state of the proceedings, it is difficult to see the applicability of the Saunders v. Shaw doctrine. The case at bar had been decided on the evidence and the record, each time contrary to petitioners' contentions, on three separate occasions—by the trial court, by the Supreme Court on July 24, 1957, and again by the Supreme Court on September 18, 1957. The petitioners, however, made no effort or attempt to raise a Federal question until their "Petition to Recall Mandate" in October, 1957.

In an attempt to justify this procedure, petitioners now plead "surprise" and say they have been deprived of an opportunity to add to the record, to bring themselves within the doctrine of Saunders v. Shaw. The difference between the two cases is startling: In Saunders v. Shaw, "adding to the record" meant to introduce evidence in the trial court; in the case at bar, "adding to the record" means merely filing another petition for rehearing. (See Petition, Appendix "F", Page 68).

The Petitioners have certainly stretched to the breaking point both the Saunders v. Shaw doctrine and the due process clause of the Constitution.

3. All decisions by the Florida courts in the case at bar—including the trial court's decree, the Supreme Court's judgment and opinion, the Supreme Court's ruling on the Petition for Rehearing and the Supreme Court's ruling on the Petition to Recall Mandate—were decided solely on the basis of local law and local rules.

The Florida courts, in the case at bar, have never passed upon a Federal question, as is shown by reading each of the various decisions of the Florida courts:

a. The final decree of the trial court is shown in the Petition, Appendix "B", Pp. 31-36, and it reveals on its face that it was decided solely on the evidence and Florida law;

b. The opinion of the Supreme Court of Florida, July 24, 1957, shown in the Petition, Appendix "C", Pp. 37-49, reveals that no Federal question was under consideration;

c. The order of the Supreme Court of Florida, denying the first Petition for Rehearing, September 18, 1957, is shown in the Petition, Appendix "E", Pp. 61-62, and it, too, is based on local matters only, in particular, the sufficiency of the evidence.

d. The letter of Chief Justice Glenn Terrell, of the Florida Supreme Court, rejecting the Petition to Recall Mandate because it was filed contrary to the rules of that court, is shown in the Petition, Appendix "F", Page 71, and shows that it was based only on the local rules.

In addition, of course, the petitioners themselves say that a Federal question was raised only in their Petition to Recall Mandate, and do not allege that any Federal question was raised before the Florida courts prior to that time.

The actions of the Florida Supreme Court of which the petitioners here complain were not only based solely on local law, but these actions were also purely procedural actions. Thus, petitioners, in their petition in this Court, complain of such procedural matters as consolidation of cases (Petition, Page 13), whether the Florida court can go "outside the record," (Petition, Page 3), how the Florida Supreme Court should conduct oral arguments (Petition, Page 7), the correct procedure to be used in denying a petition for rehearing (Petition, Page 9), and whether the Florida Supreme Court could refuse to consider a second petition for rehearing (Petition, Page 3).

It is, in fact, clear from the petition for certiorari as a whole that nothing is involved in this proceeding at this time except procedural matters. Nothing in the

petition for certiorari would justify a reversal by the Supreme Court of the United States of the actual decision of the Florida Supreme Court to affirm the final decree of the trial court.

The quintessence of the case is the trial court's holding that the Miami Beach zoning ordinance was invalid as to the six hundred feet of property involved, and the Florida Supreme Court's affirmation of this decree on the ground that the decree was justified by the evidence and was without error.

Nothing in the petition for certiorari discloses any error of either of the Florida courts in judging the evidence or in applying the substantive law. All questions raised by the petitioners are procedural matters, in no way affecting the fundamental decisions.

The accepted rule is that decisions of state courts based on local laws not involving constitutional questions are not reviewable in the Supreme Court of the United States. **Hibben v. Smith, Ind. 1903, 24 S.Ct. 88, 191 U. S. 310, 48 L. Ed. 195,** and many other cases. It is also an established principle that judgments of a state court will not be reviewed by this Court if they rest upon adequate state grounds. **Live Oak Water Users Assn. v. Railway Commission, 269 U. S. 354, 359, 46 S.Ct. 149, 70 L. Ed. 305,** and many other cases.

It is also true that the United States Supreme Court will not review a decision of a state court on a matter of state pleading, practice or procedure. **Central Vermont R. Co. v. White, Vt. 1915, 35 S.Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, Tripp v. Santa Rosa St. R. Co., Cal. 1892, 12**

S.Ct. 655, 144 U. S. 126, 36 L. Ed. 372, and many other cases.

In **Southwestern Bell Teleph. Co. v. Oklahoma, Okla.** 1938, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751, the Supreme Court of the United States granted a motion to dismiss an appeal from a determination of the Supreme Court of Oklahoma denying a petition for rehearing. The United States Supreme Court, in its opinion, stated that it had no way of knowing whether the petition for rehearing was denied on procedural grounds or on judicial grounds, and dismissed the appeal, saying:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U.S. 216, 234, 32 L.Ed. 125, 132, 8 S.Ct. 1053; Johnson v. Risk, 137 U.S. 300, 306, 307, 34 L.Ed. 683, 686, 11 S.Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U.S. 293, 295, 297, 35 L.Ed. 193-195, 11 S.Ct. 528; Whitney v. California, 274 U.S. 357, 360, 361, 71 L.Ed. 1095, 1099, 1100, 47 S.Ct. 641; Lynch v. New York, 293 U.S. 52, 54, 79 L.Ed. 191, 192, 55 S.Ct. 16."

In the case at bar, it was wholly unnecessary to decide a Federal question at any stage of the proceedings, and every decision of the Florida courts, in fact, rested wholly on adequate state grounds.

4. The question presented by petitioners and their statement of reasons for granting a writ of certiorari reveal that their sole grounds for invoking the Fourteenth Amendment to the Federal Constitution is that the Florida Supreme Court did not grant them a rehearing. Under Florida law, a rehearing is not a matter of right but rests in the sound judicial discretion of the court.

To consider this point, it is necessary to analyze the five-part "Question Presented" by the petitioners (Petition, Pp. 3-4) as well as their petition as a whole.

The "Question Presented" states: "Did the Supreme Court of Florida deprive the petitioners and the citizens of Miami Beach of their "Day in Court" in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;" and then lists five particulars which we shall not quote here. The essence of the question is that petitioners contend that they have been deprived of their "Day in Court." Is this true?

First of all, the petitioners were not parties to the suit in the trial court and sought to intervene only after final decree. Therefore, they cannot complain that they had no "Day in Court" in the trial court since they were not necessary parties to the suit and did not seek to intervene until after the final decree had been entered.

Secondly, the petitioners were allowed to intervene for the purpose of taking an appeal. Again, they were not deprived of their "Day in Court" but were actually allowed a "Day in Court" despite their delay in intervening.

Thirdly, the petitioners were allowed to file a brief on the appeal in the Florida Supreme Court. (Petition, Appendix "C", Page 38).

Fourthly, the petitioners were allowed to argue the case orally in the Supreme Court of Florida. (Petition, Appendix "C", Page 46).

Finally, petitioners were allowed to file a Petition for Rehearing in the Supreme Court of Florida. (Petition, Appendix "D", Pp. 53-59).

Thus, petitioners had every "Day in Court" that any litigant can expect or is entitled to under the law and practice of the State of Florida. It is true that their petition for rehearing was denied but this is certainly not uncommon in the Florida Supreme Court or in any other court.

Furthermore, rehearings in the Florida Supreme Court are not a matter of right. In **Trustees of Internal Improvement Fund v. Bailey, 10 Fla. 238, 253,** it is said:

> "Rehearings, therefore, in this Court, are not authorized by statute, nor are they a matter of right, but rest in the sound discretion of the Court."

Thus, a mere denial of a petition for rehearing is not

a deprivation of a "Day in Court", nor does it violate due process of law. Especially is this true in the case at bar where petitioners' Petition for Rehearing attacked the judgment of the Florida Supreme Court on a merely collateral issue and completely failed to point out any error in the actual **ratio decidendi** of the judgment.

5. The Petition for Certiorari reveals on its face that there are no "special and important reasons" for granting it, as required by Rule 19 of this Court.

The applicable portion of Rule 19 of the Rules of this Court is as follows:

"Rule 19. Considerations governing review on certiorari.

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

In the case at bar, there is simply no "special and important reason" for review by the Supreme Court of the United States. However, petitioners in the "Reasons

for Granting Writ of Certiorari" set forth in their petition (Pages 10-15) attempt to manufacture such reasons and, in doing so, they tend to mislead the Court in several important respects.

On Page 11 of the Petition for Certiorari, the whole argument of the two complete paragraphs is misleading. The land here involved is not the only remaining ocean-front property in the City of Miami Beach that has been preserved for residential purposes, as petitioners state. In fact, the property here involved is only six hundred feet of oceanfrontage. The remainder of the mile and a half strip of oceanfrontage is not involved in this suit whatsoever. Every statement in the second full paragraph on Page 11 of the petition applies only to the mile and a half strip as a whole and nothing in the record indicates that these statements apply to the six hundred feet here involved. The Final Decree itself (Petition, Appendix "B", Pp. 34-35) specifically indicates that only six lots are involved in this case.

The case of Lansburgh v. City of Miami Beach, mentioned on Page 12 of the Petition for Certiorari, has never entered into the decision or record of the case at bar and is here injected into the case for the first time. The Lansburgh case is presently in the process of appeal in the Florida courts and has no relevance to the case at bar since the subject matter of the Lansburgh case took place long after the final decree was rendered in the case at bar.

The initiative election, mentioned at Page 13 and elsewhere in the Petition for Certiorari took place long after entry of the final decree in this case. In addition,

said election involved the strip of land a mile and a half long and not merely the six hundred feet involved in this case. The results of this election are also under attack in the Florida courts at this time.

The case of City of Miami Beach v. Lachman, mentioned on Pages 13-14 of the Petition for Certiorari is not before the Court at this time. The point the petitioners now raise in relation to that case was disposed of by the Supreme Court of Florida in its opinion on adequate and non-Federal grounds. (See opinion, Petition, Appendix "C", Pages 44 and 48). In any case, petitioners in their first Petition for Rehearing did not even mention the Lachman case. (Petition, Appendix "D", Pp. 53-59).

The Florida Supreme Court, in its opinion of July 24, 1957, said: (Petition, Appendix "C", Page 48)

> "Even if all of the parties were identical, which they are not in these consolidated cases, and even if the action related to the same lands as in the former cases, which it does not, the record reveals changed conditions at the time of the entry of the decree appealed from which would render inoperative and inapplicable the principle of res judicata urged by the appellant."

Not only was this opinion based on purely local facts and local law, but the petitioners did not even question it in their first petition for rehearing. They cannot now urge it as a "special and important reason" for review by the United States Supreme Court.

Thus, all of petitioners' "Reasons for Granting Writ

of Certiorari" evaporate under examination. They cite evidence relating to the effect of rezoning a mile and a half strip of property, but the case at bar concerns only six one-hundred foot lots. They cite the Lansburgh case which is on appeal in the Florida courts and which has never been a part of this record and which also concerns the mile and a half strip. They cite a special municipal election which also concerns the mile and a half strip and which is also under attack in the Florida courts. They disinter the Lachman case which they did not even bother to mention in their first petition for rehearing.

In fact, the case is a simple one involving only the validity of a local zoning ordinance insofar as it affects six one-hundred foot lots in the City of Miami Beach. The trial court, in a straightforward decree, based on factual evidence, found the ordinance invalid as to that six hundred feet. The Supreme Court affirmed the decree on the basis of the evidence and the local law, as they reiterated in their order of September 18, 1957, in which they stated:

> "Moreover, the evidence in this record has been carefully examined by us and we think the conclusion is inescapable that, under the conditions existing as to the lands involved in this litigation at the time the chancellor entered his decree, the conclusion he reached is without error and should be affirmed, regardless of the subsequent enactment of the ordinance after the date of the final decree."

Therefore, petitioners have totally failed to produce "special and important reasons" for review by this Court

as required by Rule 19. It is clear that the State court has not "decided a federal question of substance not theretofore determined by this court," nor has it decided such a question "in a way probably not in accord with applicable decisions of this court." In fact, it is clear that the Florida court has decided no Federal question at all in these cases, nor does such a question exist.

CONCLUSION

For the reasons hereinabove set forth, respondents respectfully request that certiorari be denied.

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